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Commercial Registration Appeal Tribunal



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Summaries of Decisions

Volumes 21 and 22 (1991)



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS* - VOLUMES 21 AND 22

CITED 1991 21 C.R.A.T.
1991 22 C.R.A.T.

- * This volume contains in some instances full decisions and reasons given, and in others, summaries only of Tribunal decisions and Supreme Court of Ontario decisions. If reference to the exact decision is desired, application should be made to the Registrar.

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Frank's Restaurant	Meeting to decide status	6 L.L.A.T.	29
Frosty Muggins Restaurant	Stay denied	18 C.R.A.T.	435
Johnathan's Place Restaurant	Reasons for Stay	15 C.R.A.T.	255
Kelly's Keg'n Jester Tavern	Stay denied	18 C.R.A.T.	443
Lake Abbey Tavern	Specification of parties	7 L.L.A.T.	26

Liquor Licence ActName of Establishment (continued)

Orchard Park Tavern	Stay granted	20 C.R.A.T.	580
Piccolo Castello Trattoria Restaurant (Burns Proudfoot) (Piccolo Castello Trattoria Restaurant Ltd)	No jurisdiction Entitlement to require a hearing	13 C.R.A.T. 15 C.R.A.T.	75 270
Orchard Park Tavern	Stay granted	20 C.R.A.T.	580
Pros Restaurant now known as Ocean Queen Restaurant	No jurisdiction	13 C.R.A.T.	80
Restaurant L'Eventail	Meeting to decide status	5 L.L.A.T.	65
Royal Simcoe Lodge Tavern	Adjournment	7 L.L.A.T.	1
Studio One Hotel	Adjournment & stay of LLBO Order reversed	18 C.R.A.T.	433
Studio One Hotel	Adjournment & presiding chairman disqualified himself	18 C.R.A.T.	430
Tramps Restaurant	Adjournment and Consent Order	7 L.L.A.T.	14

Cross Reference Table
Licensee or Applicant

Antonangeli, Angelo (Royal Simcoe Lodge Tavern)	7 L.L.A.T.	1
Colorbar Restaurant Incorporated (Babbage's Restaurant)	13 C.R.A.T.	7
Di Giuseppe, Rocco (Tramps Restaurant)	7 L.L.A.T.	14

Cross Reference Table

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577029 Ontario Limited and	18 C.R.A.T.	430
577030 Ontario Incorporation	and 18 C.R.A.T.	433
(Studio One Hotel)		
Hallworth, James David		
(Frosty Muggins Restaurant)	18 C.R.A.T.	435
Hunter, Allan		
(Eaters Restaurant)	18 C.R.A.T.	440
Johnathan Place Limited		
(Johnathan's Place Restaurant)	15 C.R.A.T.	255
Kup, John		
(Eaters Restaurant)	18 C.R.A.T.	440
Lake Abbey Hotel Inc.		
(Lake Abbey Tavern)	7 L.L.A.T.	26
Lakeshore Pubs Limited		
(Kelly's Keg'n Jester Tavern)	18 C.R.A.T.	443
Marrelli, Federico and Yolande		
(Country Place Tavern)	13 C.R.A.T.	61
North Nottawaga Beach Cottagers Association		
(Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75
Nottawaga Creek Ratepayers Association		
(Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75
Ouzounis, Vasillios		
(Pros Restaurant)	13 C.R.A.T.	80
Piccolo Castello Trattoria Ltd		
(Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75
Proudfoot, Burns		
(Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75
Pyl-Chem Hotel Limited	20 C.R.A.T.	580
Scott, James		
(Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75
Sharpe, Charles M.		
(Frank's Restaurant)	6 L.L.A.T.	29
Silver, Morris and Edith		
(Centennial College of Applied		
Arts and Technology)	5 L.L.A.T.	5
(Chick 'n' Deli Restaurant)	5 L.L.A.T.	14
(Restaurant L'Eventail)	5 L.L.A.T.	65
612471 Ontario Limited		
(Firenze Ristorante Italiano)	15 C.R.A.T.	255
Smart, John	20 C.R.A.T.	589
373857 Ontario Limited		
(Bobby Jo's Restaurant)	7 L.L.A.T.	40
Wahnekewening Beach Cottage Owners Association		
(Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75

Mortgage Brokers Act

Haron Investments Inc. (Nicolas Nicolaides) (Canadian Financial Services)	Admissibility notice of further particulars	12 C.R.A.T.	37
Security Mortgages Services - Silver et al	Record of agreement	11 C.R.A.T	27

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Ayton, Michael Valentine	Extension of time	10 C.R.A.T.	14
Baldassarre, Antonio	Application for an Order granting a Stay of CRAT Decision pending the dis- position of the Appeal to the Supreme Court	10 C.R.A.T.	20
Baldassarre, Antonio	Objection to composition of Tribunal	10 C.R.A.T.	23
Barrette, Cyril	No jurisdiction	12 C.R.A.T.	50
Centennial Plymouth Chrysler (1973) Ltd. (D. Brown Motors (Barrie) Ltd.) (Gordon D. Coates)	Granting Stay of CRAT Order	15 C.R.A.T.	253
Coward, John D. and John D. Coward Enterprises Limited (John D. Coward Automotive Retailers)	Adjournment denied	18 C.R.A.T.	418
Dueck, Norbert H.	Stay granted awaiting SCO action with terms and conditions	18 C.R.A.T.	426
Dueck, Norbert H.	Order varied	18 C.R.A.T.	429
Dueck, Norbert H.	Reasons for Stay (to vary a previous Order)	20 C.R.A.T.	550
Dueck, Norbert H.	Extension of time	20 C.R.A.T.	554

Motor Vehicle Dealers Act (continued)

H & J Auto Centre Limited (Howard Dillon) (Town and Country Auto Centre)	Stay denied awaiting SCO action	13 C.R.A.T.	143
MacMillan, Donald Neil	Admissibility of information	11 C.R.A.T.	63
McClocklin, Richard Gary (operating as "R - cars")	Granting Stay	12 C.R.A.T.	69
Stephenson, James	Stay denied	11 C.R.A.T.	76

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Ahmed, Mr. and Mrs.	Re: costs	18 C.R.A.T.	413
Ashley Oaks Homes Inc.	Order	20 C.R.A.T.	546
Beacom, Bruce	Granting adjournment	12 C.R.A.T.	99
Bertrand, Brent	Granting adjournment	12 C.R.A.T.	102
Bobby Rubino of Canada Limited	Document examination	12 C.R.A.T.	106
Boucher, Bernard and Mary	Granting application to inspect and examine premises	12 C.R.A.T.	113
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Carleton Condominium Corporation No. 111	Granting adjournment	13 C.R.A.T.	201
Ciulla, Salvatore	Adjournment and Order	20 C.R.A.T.	547
Coventry-Graystone Properties Limited	Extension of time	11 C.R.A.T.	85

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DeSoto Developments Limited	Order	20 C.R.A.T.	548
584745 Ontario Limited	Adjournment and	20 C.R.A.T.	562
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Germeney, B. S.	Granting adjournment	12 C.R.A.T.	131
Greely Custom Homes Ltd	Granting Stay of CRAT Order-with condition	17 C.R.A.T.	275
Hale, Robert	Adjourned	20 C.R.A.T.	564
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Halton Condominium Corporation	No entitlement to hearing	11 C.R.A.T.	104
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Harrison, F.	Granting adjournment	16 C.R.A.T.	289
Heasman, Reginald	Granting adjournment	12 C.R.A.T.	136
Heath, Patricia	Adjournment	20 C.R.A.T.	570
Hussain, Hannif	Conciliation	11 C.R.A.T.	108
Jaye, Norman	Adjourned	20 C.R.A.T.	571
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Lacika, Mr. and Mrs. E.	Adjournment (objection to panel member)	20 C.R.A.T.	578
Lall, U.	Authority for Agent to act	12 C.R.A.T.	140
Lockwood, Bernard Bruce	Granting adjournment	12 C.R.A.T.	153
McEachern, Walter H. and Elizabeth K.	Direction	13 C.R.A.T.	219
Moir, James and Pamela	Granting adjournment	18 C.R.A.T.	445

Ontario New Home Warranties Plan Act (continued)

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Shah, Ismat	Adjournment (terms and conditions)	20 C.R.A.T. 588
Wentworth Condominium Corporation No. 45	Claim after expiry date	14 C.R.A.T. 204
Wiley, Mr. and Mrs. G.	Order - hearing adj. sine die pending decisions in SCO actions	18 C.R.A.T. 454
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Castle Keep Real Estate Limited - Robinson et al	Clarification	11 C.R.A.T. 146
Cohen, Maurice L.	No jurisdiction	16 C.R.A.T. 288
Dani, Quemal Cam	Compliance with agreement	12 C.R.A.T. 240
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Doherty, Patrick A.	Adjournment granted	18 C.R.A.T. 425
Gentile, Angelo	Stay on Consent	11 C.R.A.T. 154

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Leung, Frank	Separate hearings	11 C.R.A.T.	193
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Morrissey, Joseph A.	Consent Order	13 C.R.A.T.	291
Nimmo, Robert Bruce	Appl'cn. by Applicant for lifting of stay denied	18 C.R.A.T.	448
O'Brien, Gregory J.	Consent Order	13 C.R.A.T.	294
Rana, Sudershan and Shipra	Adjournment and Order	20 C.R.A.T.	581

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AGS International Travel & Services (Angela Stippinger)	Registrar's Order extended	15 C.R.A.T.	251
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Ashok Travel Limited	Request for adjournment	10 C.R.A.T.	143
Aslanidis, Steve (See Thessaloniki)			
Bolos Travel Service (Andy Hadjiyannakis)	Adjournment and Order	16 C.R.A.T.	286
Concorde Travel Agency (see 795159 Ontario Inc.)			
Danni International Travel Agency Ltd	Adjournment and Order	12 C.R.A.T.	246
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889362 Ontario Ltd. (Sun Holidays)	Extension of expiration of Order	20 C.R.A.T. 556
Hadjiyannakis, Andy (See Bolos Travel)		
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- Clark et al	No jurisdiction	11 C.R.A.T. 209
- Lowes, Florence	No jurisdiction	11 C.R.A.T. 210
Lifestyle Travel (Susan Koehler)	Adjournment and Order	12 C.R.A.T. 252
Lowes, Florence	Entitlement to hearing	15 C.R.A.T. 267
Manila International Travel Agency Ltd	Suspension	13 C.R.A.T. 303
Manitoba Travel Association - Byron's et al	Procedure	11 C.R.A.T. 232
Merivale Travel Agency Limited	Adjournment and Order	20 C.R.A.T. 579
141603 Canada Limited	Order as per settlement	18 C.R.A.T. 453
Penhale Travel Agency	No entitlement	17 C.R.A.T. 281
Professional Seminar Consultants		
- Associated Building Industry of Northern California		
- Brown et al		11 C.R.A.T. 237
- Medical Society of Santa Barbara County		
- Almklov et al		11 C.R.A.T. 240
- Alameda County Dental Society Crutcher et al		11 C.R.A.T. 243
- Golden Gate Nurses Association Inc.	Multiple claims	
- Chappel et al	- Adjournment	11 C.R.A.T. 246

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- Associated Building Industry of Northern California	Affidavit evidence	14 C.R.A.T. 199
- Brown et al		
- Medical Society of Santa Barbara County	Affidavit evidence	14 C.R.A.T. 199
- Almklov et al		
- Alameda County Dental Society - Crutcher et al		14 C.R.A.T. 199
795159 Ontario Inc. (Concorde Travel Agency)	Extension of expiration of Order	20 C.R.A.T. 585
Starburst Holidays Inc. (Douglas Travel) (Traveler's Tree)	Consent Order	13 C.R.A.T. 361
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Thessaloniki-SKG Travel Service (Steve Aslanidis)	Adjournment and Order	16 C.R.A.T. 284
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RICHARD J. AREND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:

RICHARD J. AREND, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 26 February 1991

Toronto

REASONS FOR DECISION AND ORDER

Richard Arend appeals to this Tribunal from the decision of the Ontario New Home Warranty Program dated July 26, 1990 disallowing his claim for further repairs to various doors in his condominium suite. The only matter which concerns this Tribunal and the subject of the appeal is his complaint filed with the Program on January 22, 1990: "door alignment and hanging problems - can you inspect them and make the builder fix them".

It appears that the builder had attempted to address the complaint on July 20, 1989, a month after Arend took possession and sent a copy of the account to the Program as evidence of the repairs. The account reflects four and one-quarter hours of work by two men on the doors, but since the appellants remained dissatisfied, a further attempt was made on September 7 to fulfil the builder's obligation. This, however, was apparently unsuccessful since Mr. Arend continued to demand the repair of his doors and requested a conciliation meeting.

The findings of the conciliation are set out in the report of April 30, 1990:

April 30, 1990

Mr. Richard Arend
7 Bishop Avenue, Apt. 2215
Willowdale, Ontario
M2M 4J4

Re: Our file #10-5310-231842

Dear Mr. Arend:

This report is to confirm our conciliation meeting of April 23, 1990. In attendance: Mr. Arend, Homeowner; Ms. Shirley Kong, builder's representative Vogue Developments Inc.; Rob Rosset, ONHWP Conciliator.

1. Concern: Laundry room door - 1/2" gap top sticks out of frame at right corner.

Observation: The top right hand corner of the laundry room door has a deflection of approx. 3/8" from the frame when in the closed position. The bottom right hand corner was flush within the frame.

Decision: The builder is required to affect the necessary repair.

2. Concern: Bedroom door - 1/4" top sticks out of frame at left corner.

Observation: The bedroom door has a slight gap between the door and the jambs and has been installed in an acceptable manner.

Decision: No further action is required on this concern.

3. Concern: Bathroom door - 3/8" top hangs low from frame at right corner.

Observation: The bathroom door has a gap of approx. 3/8" at the header jamb on the striker plate and tapers down to approx. 1/8" at the header jamb of the hinge. The door is very difficult to close from both inside the washroom and also from the hallway.

Decision: The above concern is not acceptable and must be repaired.

It is the responsibility of the homeowner to notify the Program if the vendor/builder does not complete the concerns as noted.

Yours truly

Rob Rosset, Conciliator

cc: Vogue Condominiums

On June 15, the Program reported to Mr. Arend as follows:

June 15, 1990

Mr. Richard Arend
7 Bishop Avenue, Apt. 2215
Willowdale, Ontario
M2M 4J4

Re: Our file #10-5310-231842

Dear Mr. Arend:

The following is the result of a reinspection of items warranted from the April 30, 1990 conciliation. In attendance: Mr. Arend, homeowner; Ms. S. Kong, builder's representative; Mr. Rob Rosset, ONHWP conciliator.

1. Concern: laundry room door - 1/2" gap top sticks out of frame at right corner.

Observation: Homeowner's concern this time is lack of space between the door edge and door jamb on butt hinge side, which is tight against the jamb. This does not affect the operation of the door in any way.

Decision: The builder has repaired the door in an acceptable manner. No further action is required.

2. Concern #3: Bathroom door - 3/8" top hangs low from frame at right corner.

Observation: The gap at the top of the door between door edge and header jamb has been reduced to an acceptable size of approx. 3/16". The door is now able to close and lock with little pressure.

Decision: The builder has repaired the door in a good workmanlike manner.

Yours truly

Rob Rosset, Conciliator

cc: Vogue Condominiums

In the meantime, Mr. Arend sued the builder over the doors in the Small Claims Court, an action which he said was dismissed. In his evidence, the appellant laid great stress upon what he alleged should be the maximum tolerances of space between the door and the frame. He argued that the spaces varied in his suite and were not examples of good workmanship. He seemed to be under the impression that a Mr. Jekabsons of the Program had given him the measurements of various tolerances for inside doors. This, however, was denied by the latter in his evidence, since he said there were no regulations governing tolerances for inside doors either in the Act or in the Building Code.

Mr. Rob Rosset, a conciliator with the Program, had attended the inspection on April 23 and the report of April 30

reflects his findings. He said he ordered the builder to make the repairs he found necessary, and returned for a re-inspection on June 15. His report of that date indicates he found no further problems or repairs required.

One of Mr. Arend's grounds for appeal is that, "Mr. Jekabsons quoted to me interior door tolerances for condominium suites that appear not to exist." The evidence is that they do not exist, in either the Building Code or the Ontario New Home Warranty Plan Regulations. Mr. Arend, however, possibly acknowledging now that there are no prescribed tolerances insists, that there should be.

In short, Mr. Arend's complaints appear to be more with the deficiencies he finds in the Ontario New Home Warranties Plan Act than in those alleged to arise from faulty workmanship or defective materials in his suite.

This Tribunal, however, is not constituted to argue that point since it has no jurisdiction to vary the legislation.

In considering Mr. Arend's argument and the evidence adduced by him and the Program, we must conclude he has not satisfied the onus on him to prove his case. There is no evidence to support his claim of either defective materials or faulty workmanship. Mr. Arend's appeal is brought under Section 14(1) of the Act. Section 14(1)(a) is not applicable to the situation and there is no evidence of breach of warranty or major structural defect to bring it within sections (b) or (c) of Section 14.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

BAIF CENTREVILLE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
D.H. MACFARLANE, Member

APPEARANCES:

ARNIE HERSCHORN, ANDREW A. LUNDY, IAN J. CANTOR,
representing the Applicant

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF 10 October, 1990

HEARING: 3 January, 4 February 1991

Toronto

REASONS FOR DECISION AND ORDER

This is a decision arising out of a hearing with respect to a Proposal by the Ontario New Home Warranty Program not to renew the registration of Baif Centreville as a builder under the Ontario New Home Warranties Plan Act. The basis of the Proposal is founded on two grounds:

1. Failure to honour the warranty imposed upon a builder under the Ontario New Home Warranties Plan Act.
2. Failure to indemnify the Corporation for monies paid out by the Corporation to honour the Warranty, invoices for which have been sent to the builder, and which the builder has refused to pay.

Initially, the Proposal was based upon seven homes constructed by the builder, but at the commencement of the hearing in October, counsel for the Program identified the fact that only five homes were now to be considered the basis for the Proposal of the Program. These five residences may be referred to by the names of their owners: Skippon, Ostric, Havlin, Khanna, and Vuong.

In each of the five cases upon which evidence was presented to the Tribunal, it was evident that work needed to be done and that the builder appeared to be lax and slow in exercising its obligations and responsibilities to the individual homeowners under the Act. In many cases, warrantable work was either not done or poorly done or incompletely done, and in some cases it appears that after a considerable period of delay, work was only done or commenced on the day of the conciliation. In almost all cases, the evidence clearly indicated that the homeowners on many occasions refused access to the Builder or its tradesmen, and while this may have been in part the reason for the builder's inability to complete the work, it also is perhaps indicative of the delay which had occurred to such a degree that the homeowners had become frustrated by the lack of action on the part of the builder.

There is no doubt on the evidence of the Builder's representatives before the Tribunal that for whatever reason delays had occurred in the correction of the legitimate complaints of the homeowners in this subdivision. In fact on the evidence of Miss Cheryl Weston, although there were only one hundred homes in this subdivision, there had been fifteen or sixteen conciliations, whereas the subdivision across the road also developed by Baif Centreville which consisted of approximately three hundred homes, had only the same number of conciliations. It is obvious, therefore, that there were problems in the subdivision giving rise to this Proposal. In the view of the Tribunal, the Program has to assume some responsibility for the difficulties which ensued.

In particular, the Tribunal is concerned that in all cases, following the initial conciliation and after some work had been done by the builder, subsequent inspections were conducted by the Program with the owner in the absence of the Builder. Thus the Builder was unable to defend itself with respect to repairs which may have been interrupted by the action of the homeowner in denying access to the builder or its trades, or with respect to repairs which, in the builder's opinion had been satisfactorily completed but not so in the opinion of the homeowner. It is, therefore, possible that additional work was authorised by the Program or cash settlements made by the Program with the homeowner which should not have been done had the Builder had an opportunity to question the bases upon which additional work or settlements were to be made.

In the view of the Tribunal, the Program bears a responsibility on how it spends money of other people, in this case that of the Builder. In the Khanna case, the cash settlement greatly surpassed the original Program estimates and in the Ostric case, the cash settlement was on the highest of three estimates given; and in addition, payment for repairs to a supposedly leaky

garage roof were authorized without, in the Tribunal's view, a proper examination. The Tribunal is concerned that the Program can then compel a builder to pay such items of cost incurred under threat of having its licence cancelled or not renewed. Yet the builder not having had an opportunity to participate in the final settlement, or an opportunity to defend its actions cannot question the invoice sent to it by the Program without facing the situation such as confronted Baif Centreville in this particular subdivision.

It is one thing to deal with a Builder who callously disregards its obligations to its customers under the Act. But in the case of a Builder such as Baif Centreville, who obviously made some reasonable attempts to satisfy its purchasers, although sometimes belatedly, it appears to the Tribunal that the Program has acted in a cavalier fashion in paying out money in the form of cash settlements or authorizing repairs in the five residences with which we are concerned.

The Tribunal is also concerned with the approach of the Program to cash settling. At least in one case, Havlin, the homeowner was given the option of obtaining an estimate for the purposes of settling. The Tribunal is concerned that the Program is avoiding its responsibility in determining the cost of work in such circumstances. The Tribunal is not unaware of the fact that in the Ostric case which appeared before the Tribunal last year, Mr. Ostric was asserting a claim against the Program for more than \$25,000 when the Program had settled with him for some \$9000, which in itself was the highest of three estimates. In other cases such as Vuong, the Program knew that at the time of coming to a settlement with Vuong, that the Program's contractor could not and would not do any repairs, and simply went ahead and settled with Vuong more than eight months after the reinspection and almost a year after the initial conciliation without any further discussion or notification to the Builder.

The Tribunal also has concern that the Program may be entering into cash settlements with owners with no obligation to see that the work is actually carried out. While this is perhaps acceptable in the case of non-structural matters, the Tribunal is of the view that the Program may be failing subsequent purchasers if it is not assured that major structural defects have, in fact, been repaired out of any cash settlement. It is also the view of the Tribunal that in dealing with a cash settlement, there is some responsibility upon the Program to consider whether the owner may very well accept the settlement and not necessarily have the work done, or may do the work himself, in which case in arriving at a settlement figure, the Program should eliminate the profit portion in the work which forms the basis of any settlement offered to the homeowner.

Another matter which is of concern to the Tribunal and which occurred in the Khanna case was that the Program provided the Builder with an estimate of the cost and then settled for a much larger figure. In these circumstances, it is the view of the Tribunal that the Program had an obligation to communicate its intentions with the Builder.

In dealing with communication, there is fault on the part of both the builder and the Program. The Tribunal has already noted that the builder was not informed of subsequent inspections on site, but the builder on its part appears to have been slow in communicating with its homeowners and it appears also to have not promptly informed the Program of the difficulty it was experiencing with regard to access to many of the homes upon which the Proposal is based.

It is the view of the Tribunal in this case, that both the Program and the Builder failed to communicate adequately with each other or to deal responsibly with their respective obligations. For this reason, the Tribunal is of the view that the Program's Proposal to not renew the Builder's registration is not an appropriate remedy. The Tribunal is of the view, however, that had the builder been more co-operative and communicative with both the homeowners and the Program, many of the costs incurred by the Program would not have had to be so incurred. Accordingly, it is the view of the Tribunal that the Builder has an obligation to reimburse the Program for some of the expenditures incurred by the Program.

The Tribunal will review these items in respect to each of the five homeowners.

SKIPPON:

Although there were mixed views as to the brickwork to be repaired and the flashing at the window sills, and although it is clear that the builder did some of the work, the evidence of Mark Liley that he did brickwork in the amount of \$1,070, and work on the quoins in the amount of \$180.00, is in the view of the Tribunal, work which should have been done by the builder. Accordingly, the Program has claimed reimbursement in the amount of \$1,070.00 plus \$160.50 administrative fee for a total of \$1,230.50 and \$180.00 plus 15% administrative fee, which the Tribunal determines to be \$27.00 or a total of \$207.00 for a total to be paid by the Builder to the Program of \$1,437.50.

OSTRIC:

As indicated, the Tribunal is not at all satisfied with the amount incurred by the Program in respect to repairing the garage roof for \$690.00 plus 15% because the evidence of the Program's investigator was that he did not see any evidence of leak, and simply took the word of Mr. Ostric that if there was a heavy rain or a snow build-up on the roof, leakage occurred. With respect to the three estimates which were obtained by the Program, it is the view of the Tribunal that there should have been consultation with the builder and, therefore, the lowest estimate should be the amount for which the builder should be charged. This amounts to \$6,243.00 plus an administrative charge of 15%, or \$936.45, for a total of \$7,179.45.

KHANNA:

In this matter, the Program estimated that the work would cost \$2,600.00. It also indicated that two staircases were to be built, which in fact it subsequently acknowledged were not required. There is no doubt that some work was done and that there was a cash settlement paid out by the Program of \$3,500.00. It was indicated that Khanna had refused access and some question as to whether work was ever done by Mr. Khanna. Under the circumstances, therefore, the view of the Tribunal is that the Builder should be charged only 50% of the settlement in the amount of \$1,750.00 plus 15% administrative fee of \$262.50, for a total of \$2,012.50.

HAVLIN:

There was much conflicting evidence in this matter as to whether work was done which Havlin accepted, and again this presented a problem to the Builder. The Program cash settled this for \$5000.00, but in the view of the Tribunal and based on the evidence heard, the Tribunal is prepared to charge to the Builder only for three items identified under the Azores Hardwood Flooring Inc. "\$752.50 to resand and refinish the floor", which the builder acknowledged had not been completed; "\$500.00 to level or patch up the sub-floor", and \$1000.00 to refinish the staircase, which again had been acknowledged as not having been completed. These items total \$2,252.50 plus 15% administrative charge of \$337.87, for a total of \$2,590.37.

VUONG:

The evidence of the tileman was that he had completed three of the items on the work list. Accordingly, the Tribunal is

prepared to assess to the Builder \$1,750.00 for Items 2 and 3 and \$250.00 for items 6 and 7 identified in this project, for a total of \$2000.00, plus a 15% administrative fee of \$300.00, for a total of \$2,300.00.

The total to be paid by the Builder, therefore, to the Program is \$15,519.82 and not the \$29,146.75 assessed by the Program.

By virtue of the authority vested in it under Section 9(4) of the Act, the Tribunal hereby directs the Program to renew the registration of Baif Centreville and directs Baif Centreville to pay to the Program the sum of \$15,519.82.

TAYLOR AND SHARON BEDFORD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
ALBERT LONGO, Member

APPEARANCES:
IAN HULL, representing the Applicants

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATES OF 30 April 1991
HEARING: 7 May 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Taylor and Sharon Bedford from the decision of the Ontario New Home Warranty Program of June 14, 1990 in which they were offered a cash settlement of \$14,857.33 in full satisfaction of their claims against the builder and the Program. The Appellants countered with an offer to settle on the following terms:

1. Our cash settlement for the 20 items in schedule February 1990 is \$18,900.00 plus any additions found while warranted work is being done.
2. Our cash settlement for the 20 items plus additional items in Section B is \$47,600.00 plus any additions found while warranted work is being done.

It is clear from the above figures that any resolution of the parties differences could not be expected as long as they were so far apart and the matter has, therefore, been referred to this Tribunal for adjudication. Another factor militating against settlement is the number of conciliations which have taken place during the Appellants three-year residence in the home and the continuing intransigence of the builder.

Mr. and Mrs. Bedford took possession of 502 Malvern Crescent, Newmarket on April 14, 1988 as the first owners. The home was built by Cornolo Investments Inc. of Holland Landing pursuant to a contract of purchase and sale dated December 14, 1987. It is trite to say that the builder was shoddy in much of its workmanship and the Bedford's complaints included 20 items found to be warranted by the Program and six not covered by warranty.

This is reflected in the final conciliation report dated the 20th day of February, 1990. Of the 20 deficiencies conceded to be warranted, only numbers 11 and 12 are seriously contested by the Program in the amount of work required to repair them and the amount required to be paid for the completion of the work. They are:

11. To repoint mortar joints at the following areas, both coined areas of garage, step crack at rear elevation, entire vertical crack mortar at garage and dwelling junction east side.
12. To remove garage floor from front to rear, replace this floor area, align overhead garage door to fit flush to the slab, correct grade of driveway at immediate area front of garage slab ensure grade at side (West) wall of dwelling is graded so water will not pond.

Mr. Bedford in his evidence pointed out that item 11 was the biggest disputed area. He said that in his view, the brickwork was not a repairable problem, but the garage area has to be replaced. The bricks he continued, had been tuck-pointed four times. Although the front of the garage has been replaced twice the bricks are still step cracking. The Program's Conciliation officer Mr. Betz, in the first report dated November 21, 1988, corroborates the condition of the mortar at some points when he says:

Observations - there is apparently not enough mortar to the vertical area points over points of the bay projection at both the front and rear of the house. The mortar can easily be pushed in and the builder has attempted to seal the existing cracks and/or voids with an unacceptable application of caulking.

This is also reflected in the Pal report, Exhibit 5, tab

19 introduced by the Program and the Trow Report, Exhibit 5, tab 23 entered by Mr. Bedford. Although both of these reports differ in their approach as to how to effect the repairs, they are agreed that the workmanship is deficient to a degree that is not acceptable and we so find.

Item 12 relates to the garage floor which is also dealt with in the above reports. Mr. Bedford observes it is severely cracked and was not installed according to the original plans. It appears the floor is some 12 inches lower than intended in order to provide a sufficient clearance below the dining room floor which protrudes into the garage area, so that an automobile could be parked in the garage. The Pal report and the corroborating evidence of Mr. Tibor Pal at the hearing indicate the solution is to remove the slab floor and dig the clay out beneath it and allow drainage to the weepers with a granular fill. Since the floor is lower than the street, Mr. Pal suggests it be raised 5" at the back and 4" at the front to allow for a slope from which the water could drain. He suggests that the cost of this repair would be no more than about \$4,000.00.

Mr. Bedford had pointed out that he was concerned with the clearance for his automobile, but Mr. Pal who had measured it, said there would be a clearance of 2". He further recommended the grading be arranged to slope away from the garage. We therefore find, that this issue not being successfully addressed by the builder, must be resolved by the Program and we so Order.

The Tribunal has received in evidence the reports of Tibor Pal on behalf of the Program and Trow Consulting on behalf of the Applicant. We consider on all the evidence, the estimates by Trow Consulting to be excessive with regard to some items and the recommendations for repairs much beyond that required. We are more impressed by the evidence of Mr. Steve Hilchuck of Total Supply Services Limited who has given us a quotation on each item which is, in our view, consistent with the evidence of the Program's Conciliation officers. Mr. Hilchuck attended at the premises in March of 1990 and was in possession of the Conciliation Report at that time as a result of which, his estimate covers all items in issue.

We therefore accept the estimates of Total Supply Services Limited and direct the Program to complete the work on items 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19 and 20, the cost of which is estimated to be in the area of \$14,587.50 to \$15,792.00. We note that the estimates were done in January of 1990 and would expect there may be some price increase at this date.

In ordering this work to be completed, the Tribunal is discouraging a cash settlement primarily because of its possible long term adverse effect on the home. In addressing this point, our concern is primarily with items 11 and 12 which should be repaired because they most affect the durability of the house. The remainder of the items could be settled by the Program by agreement with the owners for the amounts reflected in the estimate of Total Supply. We leave that, however, to the discretion of the Program.

Item 7 has been addressed by H.B.H. Contractors Inc., Heating and Air Conditioning, the Program's contractor and will be corrected by the Program, or a reasonable and suitable cash settlement made with the owner within the price range of the estimate of H.B.H. Contractors Inc. of March 11, 1991.

IN THE MATTER OF a CLAIM by

Decision date Request date

1. TONY BERTUZZI	July 7, 1989	July 13, 1989
2. MR. AND MRS. W. CAMPBELL	July 13, 1989	July 20, 1989
3. MR. AND MRS. C. HAZELL	June 30, 1989	July 9, 1989
4. MR. AND MRS. G. SCHRAM	July 13, 1989	July 31, 1989
5. GUY SEELEY	July 18, 1989	Aug. 4, 1989
6. NEVILLE SMITH	July 13, 1989	July 25, 1989
7. MR. AND MRS. M. RAY File #1	Mar. 29, 1989	Apr. 12, 1989
8. MR. AND MRS. M. RAY File #2	July 6, 1989	July 19, 1989

for damages

AND IN THE MATTER OF the DECISIONS of the Ontario New Home Warranty Program (the Corporation designated for the purposes of the Ontario New Home Warranties Plan Act), made pursuant to Section 14 of the Ontario New Home Warranties Plan Act TO DISALLOW THE CLAIMS IN PART.

TRIBUNAL:

JAMES R. BREITHAUP, Q.C., Chairman, presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

Catherine Lyons, representing Ray, Schram, Seeley,
and Smith

Anthony and Rocchina Bertuzzi, appearing on
their own behalf

Wayne and Adelina Campbell, appearing on
their own behalf

Clement and Sabina Hazell, appearing on
their own behalf

Brian M. Campbell, representing the Ontario New
Home Warranty Program

DATES OF HEARING: 4 December 1989;
 5, 12, 13, 14, 15, and 16 February;
 17, 24, 25, 26 and 27 April;
 24, 26, 27, and 28 September;
 1 and 2 October 1990;
 6, 7, 8, and 11 February;
 25, 26, 27 and 28 March;
 24, 25, 26 and 27 June 1991;
 1 August 1991.

Toronto

REASONS FOR DECISION AND ORDER

Brandy Lane Homes - Pickering built a subdivision of 93 homes in Pickering. Offers to purchase for most were accepted in 1986 and construction took place in the Spring of 1987. Closing of the transactions was in early Summer 1987.

An association was created by 68 of the owners to advance their various concerns about their homes, and 53 had claims to the New Home Warranty Program. While six owners did not pursue claims concerning their brickwork, the other 47 did. For 12 of these, cash settlements were agreed and for 28 others repairs were made. As well, for the 28, a tinting process was offered to camouflage mortar splashes, wide mortar joints and brick mismatches.

However, seven of the home owners have pursued their claims to the Tribunal as they want to have their homes fully re-bricked to remedy all of their concerns.

The seven owners and the addresses of the houses are:

Anthony and Rocchina Bertuzzi	1708 Broadoak Crescent	Pickering
Wayne & Adelina Campbell	1710 Broadoak Crescent	Pickering
Clement and Sabina Hazell	576 Stroud's Lane	Pickering
George and Anne Schram	618 Stroud's Lane	Pickering
Guy and Diane Seeley	1819 Post Drive	Pickering
Neville & Burretta Smith	578 Stroud's Lane	Pickering
Marvin & Anne Ray	1827 Post Drive	Pickering

All of the claimants were initially represented by Mr. Robert Miller. From February 6, the Bertuzzis, the Campbells, and the Hazells represented themselves. Ms. Catherine Lyons continued to represent the other four owners.

After adjournments on two days, this hearing continued for 28 days spread over 17 months, during which evidence was received with some 152 Exhibits, and there was a further day of final argument from both counsel and the three individual owners on August 1, 1991.

Brandy Home Lanes - Pickering ("Brandy Lane"), is a division of 640458 Ontario Limited, and the builder was not a party to this series of hearings.

For the appellants, the following witnesses gave evidence including certain of the appellants:

Kaius Meipoom, P.Eng. ("Meipoom") was graduated from the University of Toronto in 1955 with the degree of Bachelor of Science in Civil Engineering and received a Master's degree in 1958. In active construction until 1973, he then switched to land management and development work until 1984 when he began a three-year term as lecturer in steel design and materials qualities. In 1987 he joined Arcon Engineering Consultants Limited ("Arcon") and continues there as an investigator of insurance claims and an expert witness and consultant. He inspected all seven houses and gave evidence in chief over eight days and was cross-examined on two further days and re-examined on one final day.

Steven F. Mortenson, B.Sc. ("Mortenson") was graduated from Queen's University in 1978 with a degree of Bachelor of Science. He was employed as a research assistant by the University and by a private company on various contracts to 1986 and has been a Laboratory Chemist with J.T. Donald Consultants Ltd. since July 1, 1987. His work includes "physical and chemical analysis of a variety of industrial products for the purpose of identification or quality control."

Glen MacDuff ("MacDuff") has been a bricklayer for single family homes for 33 years. He examined the seven homes in question. His company employs from five to seven persons and he works on site with his crew.

Brian McKinley ("McKinley") is the Managing Director of the Clay Brick Association of Canada which includes nine of eleven manufacturers, promotes the use of brick and assists in developing technical information. He has spent 30 years in the brick industry and studied engineering for two years at the University of Manitoba.

Gary Suter, BEngSc., MASC, Ph.D. ("Suter") is the President of Suter-Keller Inc., consulting structural engineers. He received his first degree from the University of Western Ontario in 1961; and his Master's degree in 1963 and his doctorate in 1967, both from the University of Toronto. His professional memberships include the Association of Professional Engineers of Ontario, the Engineering Institute of Canada, and American British and Canadian Concrete & Masonry Organizations. He is a member of various CSA Committees on masonry and has been a Professor at Carleton University since 1967. He has been a consultant for more than 20 years and is the author of more than 50 books, documents and articles.

Mrs. Ann Ray ("Ray"), Mr. Guy Seeley ("Seeley") and Mr. Wayne Campbell ("Campbell"), each also gave evidence as to their own particular homes and their concerns about the brickwork thereon.

The evidence and cross-examination for those witnesses for the Appellants took 15 days.

On behalf of the Ontario New Home Warranty Program, six witnesses were called whose evidence and cross-examination took 12 days. The witnesses were:

Tibor Pal Dipl.Ing., P.Eng ("Pal") was graduated in Civil Engineering from the University of Vienna in 1959. After working in structural engineering design in Australia and Austria, he became in 1967, the Senior Structural Design Engineer with G. Dowdell & Associates in Toronto. In 1972, he became a partner in that firm of consulting engineers now called Dowdell, Pal, Ellis & Associates Limited. Mr. Pal is a member of the Association of Consulting Engineers in Canada and of the Association of Professional Engineers of Ontario. He is a Certified Consulting Engineer, and has been used as an expert witness for ten years by the Ontario New Home Warranty Program.

Ron Grieve ("Grieve") received an Engineering Certificate in Scotland in 1967 and has had 30 years experience with building materials. Since 1987 in Tekron Services Inc., he has been a consultant on all construction materials and particularly involved in concrete, cement, brick and mortar deteriorations and

restorations. In Canada, he has reviewed more than 200 bridges in Metro Toronto and reported on water tanks and building retrofitting. He has been used for ten years as a consultant by the New Home Warranty Program.

Richard S.Kuntze, Ph.D. ("Kuntze") received his education in Berlin, Germany and was Vice-President (Operations) at Ortech International, formerly the Ontario Research Foundation. He has an international reputation in materials testing and has been a consultant since 1985. He has published more than 40 original and review papers in his 40 year career, and holds five patents. He is a member of the Association of the Chemical Profession in Ontario, the Chemical Institute of Canada and the American Chemical Society. He has been Chairman of the C.S.A. Committee on Gypsum since 1976; and of the A.S.T.M. Committee on Gypsum from 1972 to 1985.

Martin Shilling ("Shilling") has been a brick layer for 20 years, having learned the trade from his father. He is licensed to do masonry repair and chimney work in Metro Toronto.

George Snowden ("Snowden") is an English graduate Civil Engineer and a member of the A.P.E.O. since 1972. In Canada since 1965, he is a Consultant and has been with construction control since 1984 in the Inspection and Testing Branch and in Engineering design for Special Projects & Multi-storey restoration.

Russell Gray ("Gray") is the President of Nawkaw Corporation, which is the holding company for "Masonry Art", a masonry and mortar tinting process since 1988. An employee of Canada Brick from 1972 to 1987, he did colour treatments to aesthetically deal with mismatch or colour run differences to benefit customer relations. He continues to do the major part of the work of Canada Brick and states that thousands of applications have been made of his products.

For each of the seven homes, a volume of materials was compiled by the Appellant and by the Program, and these exhibits formed the basis of the discussion of each claim. In addition an

exhibit was received setting out detailed references to the Ontario Building Code for brickwork as well as the Canadian Standard and other references.

Meipoom reviewed each of the seven appellants' exhibit volumes and his comments concerning each are set out. He first gave an overview of the discrepancies in general, and said that all homes had mortar smears and droppings over the exterior surfaces. There are cracks in the mortar joints and width differences of from 8 to 30 mm. Horizontal joints are not straight he said, and there are substantial problems with walls that are off plumb and which are misaligned. In his opinion these matters are all violations of the Ontario Building Code and are not "constructed in a workmanlike manner" and "free from defects in material" which concerns form parts of the warranty required in each new home by the Ontario New Home Warranties Plan Act, RSO 1980 Chapter 350 as amended, at Section 13(1)(a)(iii) and (1)(a)(i) respectively.

He referred to the standard of weephole spacing at OBC 9.20.14 which states that they should not be more than 800 mm apart. The CSA standard of 600 mm spacing is referred to in CAN-3-A371-M84. After explaining the construction of the brick veneer system, he explained the reasons for weepholes as a draining system and the air space must not be plugged with loose mortar to allow for proper drainage. He also said that a common concern was the tuck pointing of various joints with a replacing mortar not of the colour or texture of the original, and that many courses of joints had not been tooled and many head joints not properly filled with mortar.

Meipoom also stated that for these houses, brick ties were not imbedded in mortar and that some repointed joints had cracked again. Large cracks were also evident in the centre of long wall lengths and no control joints existed to take up any strains.

Meipoom had arranged for mortar samples to be tested by J.T. Donald Consultants Limited and reported that sand/cement ratios were found to range from 6 to 1 up to 10 to 1, while the OBC standard is a ratio of 3 to 1. He also had interior studs from garage walls tested in order to measure the pull out power needed to dislodge the brick tie nails and he said that both the nails used were too short and the brick walls could be subject to greater wind forces than the tie nails could sustain, so that walls could come down.

While brick tinting had been suggested to the owners, Meipoom had freeze-thaw cycle tests done which showed to him a 15% deterioration possible in the colour quality of the brick. As he

had not seen any test data for fading over the years, Meipoom recommended to the owners to have tinting only if there was a guarantee of no degradation, or fading, or colour differences. For Meipoom the overall brick workmanship was very poor for each house.

Meipoom reviewed the photographs which he took of the Bertuzzi home to show mortar smears, poor over wide head joints, cracks and walls off plumb. Also repointing mortar differences were apparent to Meipoom and some repointed corner joints had cracked again. He noted that the Ontario Building Code required a standard for wall plumbness at 6mm deflection within 3000mm height, or 1/4" in 9 to 10 feet. He said that his measurements at the Bertuzzi house showed 8mm in 914mm and 16mm in 2438mm which far exceeded the tolerances.

For the Bertuzzi home and the other six homes, he took each of 4 wall elevations and sampled the brick courses to get a percentage of smears and splatters and to more precisely note the areas of cracking.

For the Bertuzzi home, mortar smears range from a low of 6% in the top right of the "left" profile to 52% on the "front" upper tower. Mortar splashes range from 16% in the upper "left" profile to 68% on the right lower "right". Brick mismatches ranged from 9% on the lower left "left" profile to 50% on the "front" tower area. Cracks were noted in the 135 degree angles of the "rear" profile.

By removing sheathing from the inside of the garage walls, brick ties could be touched by Meipoom who plotted their spacings from 710 to 800 mm apart vertically when the Ontario Building Code requires a spacing of not more than 600mm.

Tuck-pointing repairs for the Bertuzzi home were not of the same colour or texture of mortar as the original and the joints were not tooled, said Meipoom. Change of colour therefore shows a very patchy scene.

With the garage interior walls open, Meipoom said that he noted excessive mortar droppings, sufficient to plug up drainage patterns. Head joints were not filled to the rear and very poor workmanship was apparent. While some extrusions will naturally happen, in his view the cavity should not be so filled by an experienced bricklayer as to prevent drainage.

The pronounced cracking along the 135 degree angles of the rear elevation were of great importance to Meipoom. The failure to interlock or bond the bricks will cause re-cracking of any repairs forever, he said.

A sample of Bertuzzi mortar was provided which Meipoom said was very weak and easily scratched and broken. Meipoom noted that Construction Control reported the use of "high pressure water jetting to identify the location and extent of soft mortar and improperly formed mortar joints". Meipoom says that he finds cracks occurring again in the repointed areas as his photographs show. He commented on a report by Golder Associates which was prepared for the New Home Warranty Program on February 5, 1990 and which showed test results of the "anchorage capability of metal ties imbedded into mortar of varying sand/cement ratios. In addition the testing programme was to establish a relationship between the strength of mortar and the penetration recorded by the PR meter for mortars of varying sand/cement ratios." This project used varying mixes of ratios from 2:1 to 6:1 of sand to cement from which cubes were made and also panels of bricks were built with brick ties inserted. Brick tie pull-out tests were done and pin penetration tests were made on the cubes. There was also a report from Pal which noted various differences in Meipoom studies and put forward an analysis of mortar strength for the seven properties by Ortech International.

Meipoom plotted the mortar penetration figures against the sand/cement ratios found by the Golder report and saw the Bertuzzi and Campbell properties to have ratios of sand/cement of 10:1 and 9:1. He saw the workmanship of the bricklayers to be very poor with ratios not close to the 3:1 required for mortar mix in the Ontario Building Code. He found in general the masonry workmanship extremely bad and not acceptable. In his opinion the standards of the Ontario Building Code are not met here.

The brick tie pull-out tests done by Meipoom appear in each Appellant's book with a table of results. The inside garage wall was exposed and a length of wall stud was removed. A dynamometer was used to measure the strength needed to pull the tie from the stud. Meipoom's commentary and conclusions were:

COMMENTARY AND CONCLUSIONS

We have calculated that the force on a masonry tie spaced at 400 mm horizontally and 600 mm vertically is 40.5 lbs due to wind suction. We based our calculations for the wind suction on Ontario Building Code data, using the average force for wind occurring in Ajax and Toronto, with a frequency of 1 in 30.

Canadian Standards Association CAN3-A370-M84 Connectors for Masonry in paragraph 8.1 specifies:

"Ties and anchors shall be designed to resist all loads and forces to which they may be subjected without permitting movement or deflections that could adversely affect the integrity or performance of the masonry."

Paragraph 8.3.1., Table 3, specifies a factor of safety of 4.0 for nail pull-out from wood (short duration loads).

Using a factor of safety of 4, the ties should have resisted a pull-out force of 162 lbs. Six ties out of seven were unsafe by the criterion.

We could not perform tests to determine the capacities when subjected to pull-out forces from masonry. Considering the weak mortar strengths, we doubt that the pull-out force from mortar complied with CAN3-A370-M84, paragraphs 8.2 and 8.3.1, (using a factor of safety of 5).

Meipoom noted that usually 1½" (38mm) smooth roofing nails are used for brick ties which would penetrate through the 10mm sheathing some 28mm into a 2"x4" wall stud. There is no Ontario Building Code requirement for these nails and lengths of up to 3" can be used, with nails either smooth or spiral. He concluded that really only a 3" spiral nail would properly withstand the pull-out force of a severe wind gust. Where brick tie spacing is well beyond the Ontario Building Code requirements and the mortar is of poor quality, he saw the risk of wall collapse to be increased. Where Pal would report no damage to the walls from inadequate brick ties, Meipoom would add "as yet" since this could develop over time.

In Meipoom's report on the Campbell property, he first refers to mortar smears and uneven joints on the fireplace. The joints vary from 8mm to 19mm and the Ontario Building Code says that the maximum average should be 12mm. By referring to a series of photographs, he pointed out cracks and unfilled head joints, splatters and smears, and an uneven brick course under a window sill and repointed work which have not been properly tooled.

He noted that measurements of exterior walls show a variance in plumb of 21mm in 2148mm. While the Ontario Building Code does not directly refer to plumbness, this rate is more than 3 times the allowance of 6mm in 3000mm set out in the Canadian Standard "A371". Several photographs supported his evidence, and a misaligned wall shown in one had a 10mm variance. Other walls had up to 21mm out of plumb. He also said that weepholes were

missing and that the rule of being not more than 800mm apart was breached.

The colour and texture of mortar used in tuck-pointing does not match the original, he noted and mortar droppings plug up the air space behind the brick veneer. He was concerned with the cracks in the rear 135 degree angles and said that he found a sand to cement ratio of 7:1 for this home.

Meipoom stated that with a wind suction of 40.5 lbs and a safety factor of 4 times, a properly spaced brick tie could sustain a pull-out force of 162 lbs. For this property, the two tests pulled a 62mm nail at 132 lbs. and a 38.4mm nail at 24 lbs. Meipoom believes that a 3" spiral nail is really needed so that 65mm penetration after the 10mm sheathing would give best results.

Meipoom created a chart to plot values of the Pin Penetration meter tests against the sand/cement ratio results. In comparing his results with the Ortech report, Meipoom finds the Campbell house within the Ontario Building Code requirements while Bertuzzi would not be. For Meipoom the 135 degree angles are a real concern since the brick there is not bonded, overlapped or tied together. This is not workmanlike and acceptable to him; and the walls should be rebuilt in his view.

As he reviewed Pal's report on his own comments for this property, he noted that there may not at present be damage from incomplete head joints or plugged up air spaces "as yet". He rejects Pal's opinion that the masonry alignment is in any way reasonable.

For the Smith property, the fireplace was unsatisfactory because of mortar smears, joint widths varying and not finished in a workmanlike fashion. The exterior photographs show smears, uneven joints and walls off plumb. Bricks were not in even courses and splatters were evident with mortar mismatch from the original in repair quality and texture. One photograph showed the courses to be off plumb so that one window ledge was even to a course at one end and 1/3 of a brick off level at the other, and brick parts were added in so that Meipoom said he had never seen such a result before this. The rear bonding concern of the 135 degree angles was again noted here.

Meipoom's sketches of the four elevations of the Smith house, showed smears up to 34%, splatters up to 91% and brick mismatch up to 10% in various locations. An unexpected crack in the chimney stack was referred to, as were cracks in the longer brick walls. These matters were all unacceptable to Meipoom.

Meipoom said that some original mortar joints had not been tooled and that the patching mortar was not compatible with the original in texture or colour. The air space behind the brick veneer had 3 of 6 measured locations being less than 25mm which is the Ontario Building Code standard. Some head joints were not filled and Meipoom believed that the sand/cement ratio for this house was 10:1, although the Ortech report shows 3.26:1.

The brick tie pull-out test showed results of 40 and 32 lbs, less than one-quarter of the 4 times safety test. While he noted that Pal's report would add weepholes, tint smears and found the mortar ratio as acceptable, he disagreed with the comments of head joints and spacing as not being problems and would add "as yet" to those observations of Pal. Where Pal reports that the masonry walls are suitable and cracks can be repointed, Meipoom disagrees, particularly for the 135 degree angles and for the cracks in the long walls. For Meipoom, tinting will only mask the joint tooling and joint width problems. He believes that this house should be re-bricked.

For the Schram property, Meipoom had reported on four particular matters. He noted mortar smears on brick face, cracks in mortar joints, head joints from 8mm to 30 mm in width and bed joints from 8mm to 30 mm in width. He found that the horizontal joints were not level and the exterior walls were off plumb up to 28mm in 1,220mm. There was also a misaligned wall out by 50mm in 1800mm, and the "A371" Standard is 13mm in 6000mm for brickwork. The photographs of these matters were included in the Schram volume and were separately referred to by Meipoom in his evidence.

Weephole spacing was said by Meipoom to be up to 2610mm apart while the Ontario Building Code requires 800mm. Again, prints of the four elevations of the house were presented to show mismatch of bricks as well as smears and splatters over all areas. He concluded that the sand to cement ratio for this house was 9:1 where the Ontario Building Code calls for 3:1. Masonry tie pull-out tests for the samples of the Schram home were presented to the Tribunal.

Meipoom concluded that to resolve the weephole spacing errors, at least four or five courses of bricks would have to be removed. He believes that the better way is to take all the brick work down and replace it, thereby correcting the problems of gaps, widths, cracks, smears, splatters, plumbness and misalignments all at once.

Meipoom reviewed his report on the Seeley home and referred to the 50 photographs submitted as evidence in support of his observations. The most important area of concern was that of

walls being off plumb. While the Ontario Building code does not have a standard for plumbness, he referred again to the "A371" standard of 13mm in 6000mm as a workmanlike expectation. Here he found variances from 25mm in 1219mm to 43mm in 2430mm. Again mortar smears, head and bed joints of excessive widths up to 25mm and misaligned horizontal mortar joints were noted. Severe cracking in the 135 degree angles and cracking of repointed work was noted. Window sills are up to 2" off level and brickwork is off vertical as well. Step cracks, a one-half brick course under a window sill and joint width variations all made this work very poorly done. He saw the masonry work around the decorative circle below the front peak of the roof as "terrible", with smears, poorly cut bricks and joints not filled.

Similar comments as before were made for the excessive spacing of masonry ties and of weepholes. He found the mortar used to be weak and reported the J.T. Donald conclusion that its ratio was 7:1. A review of the four elevations of the house had several areas with 100% smears. Cracks were noted particularly on the rear elevation at three of the four 135 degree angles.

For the nail pull-out test, one 2" smooth nail required 99 lbs pressure to remove it, while the standard should have been 162 lbs, he said. While the Golder report showed a mortar ratio 2.5:1, Meipoom said that he handled a sample of mortar from the house and this showed him that the mortar was too soft. For Meipoom, the masonry here is not workmanlike or acceptable and should all be replaced.

Meipoom's first observation for the Ray property concerned the fireplace where he saw mortar smears and uneven joints together with a crack. Five photographs were entered to show these concerns. Twenty-six photographs were reviewed to show mortar smears, head joint and bed joint variances, a misaligned wall, exterior walls off plumb and chipped bricks.

Weephole spacing, non tuck-pointed joints and mortar droppings plugging up air spaces were also matters of concern to Meipoom. From the J.T. Donald report, Meipoom said that the sand to cement ratio for the mortar on the Ray home was 6:1. Again smears and splatters and mismatches were pointed out to the Tribunal from elevations of each side of the Ray house. For the rear elevation, Meipoom particularly noted full height cracks on the 135 degree angles and areas of splatters up to 89% with much brick mismatching. He said that the nail pull-out tests showed a 35 and 50 lbs result where the standard should be 162 lbs. Again he refuted the suggestion of brick tinting made by Pal and he would completely re-brick this home due to poor workmanship which is apparent here.

In his report on the Hazell house, Meipoom stated that a foundation wall crack and several form tie holes had been repaired three times without success so that repairs from the outside were needed. He found a masonry block wall between the interior house area and the garage to be off plumb by 24mm in 2438mm west of the doorway and 20mm in 1200mm off east of the doorway.

Mortar smears, head and bed joint widths, exterior walls off plumb and joints off horizontal were all cited with references to various photographs for each concern. Weephole spacing, poorly tuck-pointed joints, partially filled air spaces and bricks from two differing colour shipments were all noted. The mortar was said by J.T. Donald, to be in a ratio of 6:1.

From the four elevations of the house, Meipoom reported smears up to 70%, splatters up to 90% and mismatch of bricks up to 30% on the right elevation with comparative figures of 68%, 81% and 20% respectively for the rear elevation. Nail pull-out tests were at 40 and 39 lbs. Pal's reported comments once again were discounted by Meipoom who calls for the complete re-bricking of the Ray home. Meipoom said that the Baker Street Home Inspection Services Inc. reports on each of the seven homes agree with his view of sub-standard workmanship for the brickwork. He expects that the cost to remove the present brick, acquire and replace the brickwork and to do the necessary landscaping may be in the neighbourhood of \$60,000 per house.

Meipoom's two original tables of mortar qualities plotted against the Pin Penetration Meter (PPM) results were replaced with new tables which showed the sand to cement ratios to be more reasonable into an area of 4:1. Variations between the Ortech and Golder reports were studied by Meipoom who concluded that the large difference makes the comparisons unreliable and that the PPM tests will not establish accurate sand to cement mortar ratios. This is in part, due to the space between the brick face and the actual tooled mortar surface which must be considered in any calculation.

Counsel for the Program began his cross-examination of Meipoom by noting that more than two months had gone by since the verbal evidence had been given (February 16 to April 24). In an attempt to proceed more quickly, he chose the Bertuzzi report from the seven to highlight Meipoom's common criticisms of the houses. Arcon had sent seven reports to each of the owners as follows:

Masonry - November 22, 1989: "In our opinion an acceptable standard of workmanship and material can only be achieved by replacing each affected wall completely."

Report with photographs of all construction deficiencies

- November 2, 1989

Masonry ties photos - January 3, 1990

Brick tinting - January 8, 1990

Brick tie pull-out testing procedures - January 9, 1990

Report on pull-out tests - February 6, 1990

Elevation drawings for cracks and smears, splatters and brick mismatch - January 25, 1990

Counsel for the Program stated that these 53 homes had all been purchased in 1986 with occupancy in the summer of 1987. The claims for the masonry problems are all validly made within the first year. After the Baker Street Home Inspection Services Inc and Bradford Inspection Services reports were completed, conciliations took place with the New Home Warranty Program obtaining reports from Techron as to remedial work and from Pal on structural concerns. During the conciliation exercise, the Builder had the original masonry contractor and the Construction Control group as consultants, review the homes, power wash and do repointing as needed. By July 1989, the seven Appellants were the only group remaining to claim that only a full re-bricking would satisfy them. Meipoom's Arcon reports then developed for those seven homes. The claims were consolidated into one matter for the Tribunal and the Builder was added as a party. In addition, the Appellants obtained a brick veneer assessment report from Suter. The Program matched those reports with that of Pal and with those of Techron and Golders.

Counsel for the Program agrees that there are some masonry problems, but states that they are no different than those for which forty other owners have settled. The items of missing weepholes, brick tie placement, mortar smears and splatters, mismatched brick, mortar joint widths, cracks, overhang and mortar droppings are common to all of the 53 homes. While offers had been made to cash settle the various claims, the Program is not prepared to offer a complete re-bricking.

He saw the five issues and the Program's response to them to be:

1. That wall misalignment and plumbness are severe and are a major structural defect; which is denied.
2. That mortar missing behind the head joints and an air space of less than 25mm was a problem; which is of no consequence or damage.
3. That mortar droppings plug the egress of moisture through weepholes and many weepholes are missing; where the first is of no consequence and the second can be remedied easily.
4. That the nail pull-out tests show inadequate brick tying to the frame; which is of no serious consequence, but where missing, ties can be inserted.
5. That the quality of the mortar is well below standard; which is denied and no damage from which is in any way evident even if true.

On cross-examination, Meipoom agreed that the masonry walls are not load bearing and that mortar droppings would block moisture moving down the inside brick surface to exit through weepholes. If there is blockage, damage could occur from freezing and expansion, he said. He saw no evidence of damage or water penetration of sheathing. Thermal movement and shrinkage had caused the brick step cracking and joint cracks as a usual feature of poor work, he stated. He also stated that there was no evidence of damage caused by too few brick ties which problem could be readily cured by inserting ties through a drilled hole and plugging the exterior later. Meipoom agreed that these homes are governed by Part 9 of the Ontario Building Code being three storeys or less and of not more than 600 sq.meters and used as a residence. While the code must govern if there is a conflict with some other reference, Meipoom noted that if the Code was mute or inadequate, the Canadian Standard provides good guidance. If there is a reference to an item in Part 9, he agreed that no further source need be considered. Since plumbness and brick tolerances are not referred to in the Code, Meipoom would be guided by the Canadian Standard "A371".

Meipoom admitted that he had relied on the analysis of the J.T. Donald Consultants report and he rejected the Ortech findings on mortar strength. He admitted no personal knowledge of the tests or procedures used. He would not comment on the bond that mortar of a 10:1 ratio would form and whether such a wall would stand.

He agreed that if the Ortech findings are correct for mortar being within the 3:1 ratio except for Bertuzzi, then the mortar would be satisfactory. Since he saw and handled mortar samples and could scratch or break them, he believes that the Donald opinion of the mortar being grossly deficient is correct. However he agreed that Donald did not have original samples for analysis.

After reviewing the power washing procedure, he agreed that mortar remaining after such a process must be strong and that any repointed mortar would also be strong. The PPR meter report was reviewed and Meipoom admitted he had to rework his charts because the numbers showed the length of the 1" pin still exposed while he thought they showed penetration.

Meipoom acknowledged that the nail pull-test was his own idea and that there was no evidence of any problem in advance of the tests. The tests had not been done before, but Meipoom suspected that short nails had been used. No problems had been heard of by Meipoom and he had no evidence of any wall ever failing in Ontario for this brick tie reason.

He agreed that there were no nail or safety factor provisions in the Ontario Building Code; and he thinks that this is a deficiency which should be remedied. The inconsistencies and variances in the nail-tests results were explained by a nail not being always centred in a stud, or by the differences in the wood grain in the stud.

Counsel for the Program suggested to Meipoom that discarding the two extreme nail pull-out test results and averaging the remaining eleven, would be helpful and that the average figure would be 51.5 lbs. On comparing that figure with the Suter-Keller report average of 35.9 lbs., he suggested to Meipoom that the resultant 1.44 gives an almost 50% safety factor. Meipoom agreed but noted that brick tie spacing would also be a component and serious deficiencies were seen in these properties. Meipoom agreed that he knew of no wall ever failing for that reason. He stated that he had used the standards of the Brick Institute of America because of the long-time professional history of that group.

Meipoom agreed that the wind load on a wall in the Toronto area would be about 20 lbs per square foot and that the 1 1/2" or 40mm nail would be driven 25mm or 30mm into a stud through a 10mm sheathing and the result would be safe. Therefore he noted that the 63mm nail used to create a safety factor of four times would not be necessary and that there was no reference made to the usage of spiral nails.

On the issue of metal brick ties not bonding to the mortar, Meipoom admitted that no ties had collapsed on pull-out, so that the quality of the mortar may not be as poor as he thought. He noted that 3" nails would ordinarily not be used for brick ties as the hammering of them into a stud would shake and perhaps loosen lower ties and mortar already in place.

Counsel for the Program noted that the Canada Brick freeze-thaw degradation test results were done on clay brick and that the seven homes were built of concrete (calcite) brick. If so, was Meipoom's analysis useless? Meipoom said yes, but that the owners would learn that some degradation may occur. On the issue of brick tinting, Meipoom admitted that he did not know the composition of the liquid used. In any event he agreed that three of the types of brick tested showed no degradation while the one that did had a sandy rough surface. He denied that the concerns about brick ties, mortar and tinting issues were fanciful and said that the owners should be assured by those who know that such matters are resolved. For the fireplaces at the Bertuzzi, Smith and Campbell homes, Meipoom agreed that the freeze-thaw issue would not arise and that tinting would be helpful.

Steve Mortenson gave evidence as to the testing done by J.T. Donald and the reports which he completed. The procedure used was that of the American Standards of Testing Materials (ASTM), and the test was "C-85". Samples of mortar were ground up, homogenized and 2 gram weights were analyzed. The results showed a sand to cement mortar ratio of 10:1 for Bertuzzi and Smith, 9:1 for Schram; 7:1 for Campbell and Sealey and 6:1 for Hazell and Ray.

The Ortech reports were reviewed by Mortenson who said that "whole rock analysis" was done likely by an X-ray diffraction which is a quick test that can read by computer some 35 components. Variances in the sand and cement proportions can also be ascertained. The iron oxide and manganese oxide components were compared from the two studies. Mortenson said that the process he used sought to measure the soluble silica and this was a different approach than the Ortech procedures.

On cross-examination Mortenson agreed that the test he used was a concrete test and not one for mortar since no particular test exists. Mortenson said that a revised method is now used which is "C-1084". He believes that his chemistry is correct even though the method used was for concrete, not mortar, and for Portland cement content, not masonry cement, and that in the testing some silica can be lost.

Mortenson admitted that the Ortech test would not lose any silica; and that the tests done by that large research

organization have a very high standard. He further agreed that only two of the mortar samples were stated by Ortech to be out of the 3:1 ratio called for in the Ontario Building Code, and that these were of 3.26:1 and 4.01:1 which were not major. He agreed that if the Ortech results were correct, then the issue of mortar quality was resolved and that 3.26:1 is reasonable while even 4.01:1 would be likely satisfactory due to testing error ranges.

Glen MacDuff reviewed the brickwork deficiencies on the seven homes which he had inspected for an hour each some three years ago. He spoke of joint width, vertical cracks, poor quality of mortar, plumbness and workmanship. He stated that repointing is not good enough and that all the brickwork should be taken down and replaced. On cross-examination he stated that he used a 2 1/2" nail to scratch and probe the mortar and believed that the quality was of a 6:1 ratio and not the proper 3:1.

Brian McKinley explained the purpose of tuck-pointing as the maintenance for a weathered surface of mortar. Layers of fresh mortar are carefully packed on a clean sound base, and the outside is then tooled. A bond is developed between the mortar and the bricks by the absorption of some cement paste into the brick. McKinley had not visited these houses and on cross-examination, agreed that he had no evidence of brick work or mortar strength weaknesses. He stated that a power washing would clear out any weak crumbling mortar, but that cured hardened smears and splatters would not be cleaned off.

Mrs. Anne Ray gave evidence of the situation of her own home. She reviewed the photographs which supported Meipoom's conclusions and said that her home had deteriorated further in the past year as additional photos set out. The area over the garage had been repointed twice and the cracks were opening again. The purchase closed on June 3, 1987 and immediate complaints were made about the brickwork as the window ledges were crooked and there were smears and splatters all over. A wash was done in a month, but the results were not adequate. Sixty-eight of the 93 owners in the subdivision organized and met in the Town Council Chambers with representatives of the Program, the Ministry of Housing and the Builder. The Toronto Home Builders Association became involved and consultants studied each home in October. This led to the "Baker Street" series of reports in November 1987 which went also to the Builder and to the Program. Joint meetings were to take place and after a meeting with the local Councillor on December 7, 1987, the Town Building department became involved. She said that the Builder's consultant was the Construction Control Group and that Tony Alexander of that Group had noted overhang of brick over the foundation, missing weepholes, and cracked and unstable vertical joints, but he said that major reconstruction would not be needed.

A power wash was done in Spring 1988 to clean out weak mortar and tuck-pointing was to be done afterward. All of the particular complaints were to be resolved and on October 18, 1988 a letter went from Construction Control to the Builder confirming that "the work was carried out satisfactorily and that the exterior brickwork of this building has been restored to a sound, weathertight and durable condition."

With the support of the local Councillor, the whole matter was referred to the Town Council which resolved on October 17, 1988, that the Toronto Home Builders Association and the Ontario New Home Warranty Program commence an investigation of the quality of workmanship and into the ethics of the Builder in dealing with the purchasers in this subdivision.

The worst four homes in the subdivision had been repaired after power washing, and Ray was adamant that such remedial work was just not good enough. Eventually the Program's decision letter of June 30, 1989 offered the repairs Pal saw as necessary and the Techron view of complete tinting.

Ray said that after the power wash, an interior wall was wet at the corner angle near her fireplace and on the upper rear wall near the bedroom windows. She also mentioned some damages done to the aluminum window casements.

She stated that she understood the Construction Control sequence of procedures for the houses to be first an analysis of the mortar, then power washing and then the preparation of a detailed report. Her home did not have all of her concerns addressed, she said. Ray was involved in the formation of a Home Owners Association and a general meeting was held November 26, 1987 with the builder, sub-trades, Inspection Services, Municipal Councillors and representatives from the local MPP and from the Program and from the Ministry of Housing. A conciliation inspection was conducted for the Ray home on November 30, 1978; and a re-inspection was done on February 21, 1989 by Gerald Else.

In her letter of March 20, 1989 to Mr. Else, Ray cited the opinion that her home had "poor mortar throughout", and that tuck-pointing of the whole house would not be satisfactory. She wrote:

We have further been advised that there is the question of the infra-structure of the house, which may be causing the bricks to crack, which can only be deduced by removal of the brick. As well there is the issue of the "cracked foundation" which was not addressed in your report.

Does tuck pointing and drying a house eliminate cracked seams from reoccurring; cracked bricks from reoccurring, eliminate extra large seams (in contravention of the building code), and cure a cracked foundation? Pursuant to Construction Control's report, a copy of which has been filed with the Program, that company carried out this process in certain areas around the house, and those areas are all in need of attention again, less than eight months after they were dealt with by that company.

Ray is concerned about the length of time for which repairs would be guaranteed, and she noted the 25 year guarantee of Masonry Art had the following exclusion:

This guarantee is not applicable to, and thus considered null and void in, any situation that involves masonry which has been subjected to any form of post manufacturing treatment including, by way of example, but not limited to, such matters as sandblasting, silicone treatments or any form of chemical wash.

Since her home was acid washed in June 1987, Ray believed that the exclusion in the guarantee would affect her. On cross-examination, Ray asserted that she wanted to live in a crack-free home.

In reviewing the activities of the Home Owners Association, she said that 68 of the ninety-three homes were involved as many common problems were not resolved. Construction Control was the builder's consultant who reviewed the Baker Street reports of Fall 1987. Some work was done in Spring 1988 and Construction Control reported in November 1988. The Program was involved and eventually the offer of June 30, 1989 was made, after interior matters had been otherwise resolved.

She agreed that 40 of the owners had either taken a cash settlement or had certain tuck-pointing and tinting done to their brickwork. She also agreed that Techron, Pal and Construction Control did not recommend a full re-bricking for these homes. She said that the Region of Durham gave the owners a 5% reduction in property taxes due to the lower standard of construction which would have an affect on the value of the homes.

Ray stated that she was not satisfied with the Construction Control opinion of October 18, 1988 and that she disagreed with the view that "the exterior brickwork of this building has been restored to a sound, weathertight and durable condition".

While the Program recommended tinting or a payment of \$4,520, Ray remains concerned with the quality of her mortar, and she believes that there is no analysis to justify the final decision of the Program in her claim.

Suter examined the seven homes on December 3 & 4, 1989 and made one general report to all owners on January 26, 1990. He saw the three sets of Arcon reports and considered their contents. These reports covered the deficiencies issues, brick tinting and the nail pull-out tests. He used a screw driver to scratch the mortar surfaces, and he found "major brick veneer deficiencies". From the Ortech tests, as at June 1988, he found the Bertuzzi mortar to be deficient. He noted that three of the homes were in the group tested by Techron and the strength of the mortar was too high to be original mortar. The J.T. Donald tests showed a range of mortar strengths from 6:1 to 10:1 while the standard is 3:1 and the second Techron test showed continuing mortar weakness, he said. He acknowledged that on two of the seven properties, mortar showed a sand to cement ratio beyond the 3:1 standard in the Ortech tests. Suter also saw the nail pull-out tests as showing deficiencies which could lead to failure of the brick veneer walls.

On safety concerns, he said that where steel is used, a two times load factor is required. Since a nail is driven "blind" and may not be centred on a stud, or the stud may have a weakness, a 4 times factor is used. While a variety of nail lengths are used, Suter found that a 2 1/2" spiral nail was favoured by four of the five masonry contracts he surveyed while none used the 1 1/2" smooth nail which are in these homes. Suter said that a nail should go into the stud at least one-half of its own length and that in the absence of any nail standards in the Ontario Building Code, one should look at the CSA standards and use common sense.

He assessed the brick veneer wall system and used four criteria so that over the long term, the system must be safe, durable, serviceable and aesthetically acceptable.

In a review of the Ray photographs, he saw these criteria as all wanting so that the result was unworkmanlike. The builder advertised a quality house, and there are too many problems just to repoint since the basic deficiency of the mortar would remain, he said. Suter is also not satisfied with the effects of brick

tinting over the long term. His conclusion is that these seven homes should be re-bricked.

On cross-examination, Suter agreed that he had relied greatly on the Arcon and J.T. Donald reports. He called for the nail pull-out tests as a safety inspection. He has not seen any further separation of bricks along crack lines, nor any evidence of damage. Concerning the prospect of wall collapse, he said that a once in 30 year wind could cause damage. He agreed that while no Ontario Building Code references exist for nail lengths, the CSA standards are useful even though Part 9 of the Code would apply and not have a requirement if there is no reference thereto.

Suter stated that for him the nail size for a brick tie was an important matter. While nothing had been done about this issue since he joined the Masonry Committee in 1974, this hearing made him aware of the potential problems. Counsel suggested that if Suter had not heard of any problem in his experience, there are likely no real concerns and Suter admitted that he had no evidence of problems. Further, he had no knowledge of any wall collapse. While he had spoken with clay brick manufacturers and masonry contractors, Suter said he had not pursued the matter further.

On review of his notes about nail use, Suter agreed that no one used the 3" (63mm) spiral nail which he suggested be used as recommended in the CSA A-370 reference.

Suter agreed that there was no reference in Part 9 of the Ontario Building Code to wind suction or a safety factor of 4 times for the one in 10 year wind suction occurrence. He also admitted that the nail pull-out test was not done by him earlier or on a Part 9 house. He did not set up the test which Meipoom had devised.

The second series of nail tests were averaged with the first series by Counsel for the Program, after removing the two longer nails. The result was 51.54 lbs which, divided by Suter's calculation base of 35.9 lbs gave a safety factor of 1.44. With this factor and no failure or damage seen so far, Suter was asked if this was sufficient. He said that it was not, even though no values are referred to in Part 9 of the Ontario Building Code.

While Suter referred favourably to the use of Brick Institute of America references, he was not aware of their suggestions for nail lengths. When informed that 40mm nails could be used throughout the brick process, Suter could not see why Meipoom had not made that clear in his reports since the point is an important one.

Suter said that he only relied on the J.T. Donald mortar tests to show that the 3:1 standard had not been met. He agreed that the Ortech finding of 4.21 was much different than Donald's 10:1, and expected that Ortech results would be reliable.

While Suter was present for the five days of Meipoom's evidence, he could not say that he agreed with all points as there is an interpretation problem of results. He saw Meipoom's first chart to be of no value and the revision with proper subtraction done brought results very close to standards. He saw the Ortech results as too much of a variance from those of J.T. Donald, but the use of a wrong test or an out-of-date test by J.T. Donald would require some explaining. When told that the test results from two known 3:1 samples by J.T. Donald found a ratio of 5:1, while Ortech found 3 1/2:1, Suter agreed that Ortech's method had brought a much closer result.

Suter was referred to the comment about brick tinting in his report where he said:

To improve brick colour variations, mortar smears and mortar mismatch, the suggestion has been made to apply a surface treatment called Masonry Art Colour Treatment Solution to the veneer. Arcon's Type 2 report reproduced in Appendix A gives their comments on this issue. I advise against any such treatment. It has been our experience that such treatments do not stand up over the long term and at best become continual maintenance items; at worst, they affect appearance significantly and lead to an eventual spalling deterioration of the veneer. Our research on the performance of such treatments indicates that there are no miracle treatments with a time-proven record on the market and that there is no substitute for the inherent durability of masonry constructed in a workmanlike manner.

Suter said that he did not like tinting for any purpose since any chemical will affect the surface somewhat. He did not know of the 20 year history of the procedure, nor of the composition of the mixture so could not say if this was a sealer or a sealant. If this liquid is a penetrating sealer, Suter did not know if it would be influenced by the freeze/thaw cycle.

The four factors which a brick veneer wall system must show over the long term were then reviewed with Suter.

Under the heading of "Safety", the mortar deficiencies are based on J.T. Donald's results and Suter agreed that if those

tests are wrong, then only his scratch tests remain. The lack of mortar adherence and his 4 times safety test are met with no observable damage and no Building Code requirement, he agreed. The nail pull-out test was reworked by Suter to show that 3 of 5 examples do not meet criteria and there may be no safety problems. If the recalculations are correct, Suter agreed that mortar strength and brick tie strength were more or less satisfactory.

He agreed that weep-hole deficiency could be repaired, but since the flashing would likely be damaged, it would be better to re-brick. The 135 degree angles could be repaired if proper bonding took place and the retrofitting for excessive brick tie spacing could be substantially done in his opinion.

Three remaining areas of safety issues were cracked mortar joints, excessive mortar droppings and the re-cracking of repaired joints, Suter said.

Suter also responded to the issue of a fire hazard from the cracks and the chimney wall exterior for Smith and Ray. While he agreed that this could be a thermal movement crack, he would investigate further.

Under the heading of "durable", Suter agreed that his concerns of mortar deficiency and nail deficiency may well have been dealt with. Suter's concern of absence of movement joints was acknowledged by him to be a matter not included in Part 9 of the Ontario Building Code, and therefore not referable to these homes. He does see design weaknesses for areas above garage doors since the lack of a beam would not support the weight of brick and cracks will occur. While Suter repeated his workmanship concerns for mortar mix, nails, brick tie spacing, weep-holes and mortar droppings, he was most concerned with the items of mortar mismatch and with the eventual problems which could result from unfilled head joints.

Under the heading of "serviceable", Suter saw the veneer cracks as important guides to future problems including concerns of safety and durability. He denied that this sequence was just speculation on his part.

Under the heading of "aesthetically acceptable", he said on cross-examination that the materials just would not do the job and that full re-bricking should occur for these seven homes.

Seeley spoke of further deterioration at his home over the past year. More photographs were submitted and reviewed with re-cracking shown in various places after remedial work had been done. In addition, he said that bricks were pulling away in

various locations.

Campbell brought a sample of mortar from his home which he said crumbled easily. He noted that his chimney and garage columns are cracked. He does not seek money, but wants a sound home which only re-bricking will provide. In his opinion many settled their claims because they did not have the money or the time to fight and resolve their problems.

Counsel for the New Home Warranty Program reviewed the history of the situation. By June 1989, he noted that the Program offered to the owners the remedy of whatever structural concerns Pal had found and also brick tinting to resolve the aesthetic concerns found by Techron. A cash settlement was offered to each owner in lieu of action by the Program. Of the 47 properties, Counsel said that 28 had work done while 12 took cash and the other seven who want complete re-bricking are before the Tribunal.

He said that the Program has the same position on these claims as at June 1989. Missing weepholes would be remedied and the three garages with missing brick ties would be retrofitted. Mortar smears and splatters, brick mismatch and mortar joint variances would all be resolved by tinting. Any brick overhang would be remedied by installing angle iron. Since no structural problems result from these and no evidence of damages is before the Tribunal, re-bricking is not required in his opinion. He saw no major structural defects in any brick misalignment or plumbness concerns or from mortar droppings into the air spaces. The concerns here are the same as those of the 40 others who settled their claims, and should be similarly resolved in his opinion.

Pal was the first witness for the New Home Warranty Program. He said that these 7 homes are all subject to Part 9 of the Ontario Building Code being single residences of 3 storeys or less and a building area not greater than 600 sq.meters (6,460 sq.ft.) (O.B.C. 2.1.1.3). He stated that he had read the Arcon and Suter reports and had heard all of the evidence for the Applicants over 15 days. He said that the Code is to govern in any conflict with any other reference (O.B.C. 2.6.2.1), and that where Part 9 sometimes refers to C.S.A. standards, those are then incorporated (O.B.C. 2.6.1.1). He referred to O.B.C. 9.4.1.1(2), "where structural members and their connections conform to the requirements listed elsewhere in this Part, it shall be deemed that the structural design requirements had been met." For example, he referred to the masonry tie item (O.B.C. 9.20.9.5) where length and thickness are met by those used in the seven homes. He noted that size and length of nails to be used are not specified.

Pal said that Part 9 codifies the usual experience in

materials and has the scope and intent of instructing non-architects as to procedures for compliance. He said that no reference is made to brick ties in the Canada Housing Code, and that the Ontario Building Code was revised in 1985 and 1990 after various sub-committees reviewed the contents.

The reference to mortar was reviewed (O.B.C. 9.2.3.2.(3) which sets the mixture to be 2.5 to 3 sand: 1 masonry cement.

Mortar joints are referred to and the maximum average joint thickness shall be 12mm and the maximum thickness of an individual joint shall be 20mm (O.B.C. 9.20.4.1(1) & (2)). There is no reference to any C.S.A or Brick Institute of America principle he said, and no need to look elsewhere in this matter.

He noted that weepholes are to be spaced not more than 800mm apart (O.B.C. 9.20.13.9) and that the air space behind the brick veneer is to be not less than 25mm (O.B.C. 9.20.6.4)(2). While Pal said that there was no reference to mortar droppings in the Code, he was incorrect as they must be "prevented from forming a bridge to allow the passage of rain water across the cavity" (O.B.C. 9.20.13.11).

Pal said that masonry projection is referred to as corbelling and must as in the case of fireplace construction, not project more than 25mm beyond the supporting base brick which is at least 90mm thick. (O.B.C. 9.20.12.3). He noted that where projections were greater as along the top of foundation walls, angle irons could be attached to take up any strain. He said that otherwise, no C.S.A standards are referable to Part 9 of the Ontario Building code and that the Tribunal need not concern itself with any other outside references.

While the wood frame of a house carries the building's load, he noted that the brick veneer really only carries its own weight and that it is not meant to be waterproof.

During May and June 1989, Pal inspected 55 homes in this Brandy Lane project and found only minor structural problems, he said. He looked at the issues of brick overhang, weepholes, cracks, joint widths and brick alignment, and he found the problems in all of the houses similar and made common observations upon them.

Pal was involved in the New Home Warranty Program decisions on all of the houses. After the power washing, Pal visited the homes to assess the owners' complaints. He inspected the mortar and all of the other issues and found the houses to be safe and structurally sound with mortar of adequate quality and

appearance. He would not re-brick the homes except for one area on the rear wall of the Smith home and certain particular smaller areas on the other homes. The seven homes involved in this appeal were all inspected by Pal in June 1989.

Using the Bertuzzi volume prepared for the Program, Pal reviewed the general sequence followed for each home. He prepared a form letter with headings for each topic and then eventually wrote in his comments after each of the 55 inspections. Grieve was with him and took photos which were used in completing the Techron reports which were masonry survey sheets with a print of each elevation of the house showing any areas of concern. Pal said there were always some cracks on each house where no control joints are required under Part 9 of the Ontario Building Code. For Pal, only 1% of the mortar joints were generally beyond the Code limits and he saw no problem with them or with any wall alignments.

Pal saw no particular differences between Meipoom's survey of the exterior of these homes and the comments of Grieve. To him, tinting should resolve most concerns and the two examples where one was fully done and the other done in part, showed a tremendous improvement in appearance. He believes that each offer to cash settle is fair.

For the Campbell home, his reports cited a large number of missing weepholes and some minor cracks which were not structural in his view. He found less than 1% of mortar joint widths excessive. He heard Meipoom's evidence on this property and all of the other six, and believes that no re-bricking of any of these homes was needed in June 1989, and none is needed now.

For the Smith home, he found minor cracks, some over-wide mortar joints and a brick overhang to be repaired. He would rebuild the piers between the top windows on the rear elevation due to an out-of-plumb concern.

For the Schram home, he found 2% of mortar head joint widths excessive, and saw the need to repoint the mortar at the chimney and at the 135 degree angles. Mismatch and smear concerns would be attended to by tinting, he said.

For the Seeley home, the only major item was the need to provide lateral support to the top of the brick pier at the front entrance. Other items were minor and tinting should be used, he said.

For the Ray home, Pal would clean out some weepholes and install others. He would correct the brick overhang concern. He agreed with Techron's report of 100% mortar splash and brick

mismatch on all elevations, and said that tinting would resolve this.

For the Hazell home, Pal found excessive brick overhang and the need to correct some angle support, together with some weephole cleaning and the repointing of cracks. Pal agreed that the Techron estimates of a 10% average of mortar and brick mismatch with a 70% mortar mismatch on one elevation.

Pal saw no worse areas or concerns in these homes than were seen on the other 48 that he inspected and finds that no home requires re-bricking. There were monthly meetings in the Fall of 1989 with Thurston of the Program, Grieve of Techron and the tinter to review progress. Many had work done and some settled for cash. By December 1989, the complaints of mortar strength had to be addressed and he was present when Grieve took mortar samples for testing.

Pal had studied the Arcon (Meipoom) reports and went through the Bertuzzi example to comment on each of Meipoom's 11 deficiencies.

On width of mortar joints, he said that no C.S.A Standard was applicable. While 1% or 2% of the joints were more than 20mm in width, this caused no structural problem and tinting would resolve any aesthetic problem.

On variations from plumb, any problems noted would be corrected. There is no Ontario Building code reference and this is a subjective decision to Pal. There are no structural problems and repairs would be acceptable.

On mortar smears, he agrees that they do exist and that the remedy is to tint. There would be no effort to remove any excess other than the earlier power wash procedure.

On tooling variations, between some of the non-tuck pointed original mortar work which were flush joints, Pal noted that the Ontario Building code does not prefer any one of nine possible joints and finds no structural variances between a flush joint and a concave tooled joint.

On spacing of brick ties, he agreed that corrections in the Bertuzzi, Seeley and Schram garages should be made by inserting rods through small drilled holes which would then be capped.

On spacing of weepholes, there are some spaced more than 800mm apart and these will be provided, even though there is no evidence of any problems.

On the air space being less than 25mm, Pal saw no damage resulting from such situations in the three garages.

On mortar droppings, Pal said there would always be some, and even if excessive, there was no damage caused by their existence.

On unfilled head joints, Pal again saw no evidence of any damages, although the Code does require full joints (OBC 9.20.4.2).

On the quality of mortar, Pal stated that he had studied Meipoom's charts and had heard Suter and Meipoom on this subject. Pal believes that the Ortech findings are correct, and that scratching samples with a screw driver or a key or a nail is a useless exercise. He rejected any view that a 10:1 mortar mix could be worked by a mason; and bricks laid with it.

The J.T. Donald method and testing of ASTM C-85 was not approved, said Pal, since hardened mortar has no test pattern and the sand to cement ratio cannot be found, as cement may not contain exactly 50% of Portland cement which itself has a 21% silica content. Limestone and other additives may bring some more silica, said Pal; and this can also be lost by the testing method.

The Program used Golder Associates to do tests in mortar mixed in known ratios from 2:1 to 6:1. Pal believed that a 4:1 mortar would in fact perform satisfactorily so that the Bertuzzi sample was slightly off pattern, but was still satisfactory. While Suter and Meipoom said that the mortar was deficient and unsuitable based on the J.T. Donald results, Pal favours the Ortech findings that the mortar is acceptable. The use of the whole rock analysis method by Ortech is to be preferred as accurate while the chemical precipitation of silica content test is unreliable. For Pal, the mortar is satisfactory and some repointing is needed.

On a reference back to misalignment and plumbness, Pal said that no one had complained to him of this and that neither the Baker Street or Bradford reports referred to this. In any event, in his opinion, this is not a major structural defect and since it was not reported in the first year, it is not a valid item for warranty, and in any event is not referred to in Part 9 of the Ontario Building Code.

On the subject of brick ties, the Arcon reports were reviewed and Suter's report considered. Pal could see no reasons for these tests and the other ten deficiencies have no relation at all to this one. Suter's 21 "major brick veneer deficiencies" have

no reference to brick ties. Pal said that this is the first time such a test has been used and he has no way of checking the results against any approved standard.

Further he said that the wind suction safety factors had no application to these Part 9 homes, but refer only to architect-engineer designed buildings in Part 4 of the Ontario Building Code. There is a reference to metal ties in the Code (OBC 9.20.9.5), but no reference to the type or length of nail to be used, he said. While the Code has some references to nails for sheathing or shingle attachments, there have presumably been no problems on brick tie attachments, so no reference has been developed over the years, he said.

Pal saw nothing to be learned from the safety factors developed by Meipoom. Discrepancies occurred due to the grade of lumber, and whether or not the nail is centred in the stud, while if a nail fails, the wall will simply not collapse. Even if the various results are averaged, Pal sees no value in the experiment.

For Pal, even with a suction factor of 32.4 lbs sq.ft., an averaging of these nail tests gives a safety factor of 1.58 so that the walls are safe. Even if a safety factor of 4.0 has merit, Pal sees no requirement to re-brick these homes. Golder tried pull out tests of ties from the brick panels built with varying strengths of mortar, and using concrete brick and narrow ties required a 450 lb. pull on a 6:1 sample. Pal said this is twelve times the wind suction force of 32.4 lbs. Pal said that a mason would not use a 3" spiral nail since hammering would shake the stud and perhaps loosen lower layers of brick. Pal said that the Brick Institute of America has considered nail lengths and for any home in the United States, when wind factors are from 20 to 50 lbs, a 2" nail is satisfactory since 1 1/2" would go into the stud through the sheathing.

He finds the brick work to be of usual quality and safe. The ties will not separate from the mortar which is hard and will weather properly in his opinion.

Pal went with Grieve to do some pin penetration tests on mortar in this subdivision. He noted that mortar changes and becomes hard as it bonds after curing when water is removed by suction. The mortar in the joints gives higher readings than the cubes of mortar, he said, due to the effects of pressure suction and tooling, so that these various tests are of limited value.

There is no indication of any compressive strength or of any sand to cement ratios which can be learned from these tests, said Pal. He commented on Meipoom's charts which had to be revised

in their readings when wrong lengths were calculated, and he saw these charts as worthless.

The Jennock Brick tests which Meipoom arranged and upon which Suter reported, were on clay brick and Pal said the homes are built of concrete (calcite) brick so no connecting conclusions can be drawn from the tests.

Pal recommends tinting for the brickwork here since there is no loss over a 50-cycle freeze/thaw test on a concrete brick sample as reported by Techron. In a review of the Suter report, Pal disagreed with the concerns raised there about safety. To him, the mortar is structurally acceptable and the Ortech test results meet the Ontario Building Code standards. Further, the nail pull out tests are irrelevant and there is no deficiency in the mortar mix. Of all the other items listed by Suter as safety issues, the only one for Pal which could be a factor is that of excessive brick tie spacing which can and would be resolved by the Program.

On durability, Pal finds the materials, design and maintenance of no concern and the workmanship not unusual. He sees no validity in any of the serviceability of the items and finds the appearance issue to be satisfied by the proposed tinting process.

From the report of R.A.K. Associates, Pal finds the J.T. Donald's results wrong and the Ortech results confirmed since the accuracy of the calibration curve falls within a reasonable range of +5 to -9 %. Pal repeated his opinion that after inspecting some 300 homes over the years, he had never found one which needed re-bricking.

On cross-examination, Pal said his work with the Program took up some 30% of his practice and that he is not a member of any CSA or OBC committees. His inspection of the 55 homes took place over five or six days and was visual. He did not use a ladder or a plumb line. He did not measure any wall misalignments. The various cash settlement offers were based on his form reports which had the details of each home written in. He said that no one complained of any moisture concerns from possible weephole lack or blockage and that he did not enter any home.

He said that while repairs were needed for certain workmanlike issues, there were no Code violations of consequence except for the comments he made on the Seeley property. Pal agreed that the width of certain mortar joints was excessive, but only for one or two per cent of the total on a home.

In his opinion, tinting will greatly improve the appearance of these homes and resolve the mortar smear and splatter

complaints. Some variations of plumb exist and Pal would replace certain brick piers. Pal repeated that the spacing of brick ties and the weephole situation would both be attended to by the Program.

Pal was not certain about any second tuck-pointing procedures on these or other homes. He said that tuck-pointing does not usually fail, but if some shrinkage occurs, a much smaller crack will result. Also the appearance of the exterior will be improved especially at the 135 degree angles when redone. Pal said that 50% of any mortar cracks on a home appear in the first year and a further 25% in the second year, due to stresses from temperature changes and the curing of the mortar. The thermal cracks ordinarily appear on longer walls and lead to vertical or step cracks, he said.

He agreed that the chimney crack on the Ray home could have come from heat in the chimney and that he may have missed this since it was not referred to in his report. While Meipoom saw cracks on all four elevations of the Ray home, Pal did not notice them in his inspection, or if he did, they were minor. When reminded of Suter's report of cracks being 5mm wide, Pal noted that his own report was seven months before Suter's report and the cracks may have opened up thereafter. Pal repeated that there was no Code reference to any nail tests or requirements for fastening brick ties.

On re-examination, Pal stated that no damages have occurred from mortar droppings behind the brick veneer walls or from unfilled head joints and he saw no potential for any problems.

Grieve said that he had been retained by the Program in June 1989 to review the complaints in this subdivision. He met regularly with Thurston and Pal in the on-site trailer and went to look at the durability and quality of the brick veneer and mortar work and also at the quality of repairs. He prepared reports for each home and while he found that the durability of work was satisfactory, he recognized that there were major aesthetic problems for the owners.

The concrete bricks in the subdivision came from Primeau-Argo and from Canada Building Materials, which companies supply some 80% of the Metropolitan Toronto market. Grieve was told by CBM of a brick tinting procedure and this was used to resolve mismatch of runs and other concerns.

In order to be satisfied with the procedure, Grieve had two sample houses tinted so that others could consider this process for their own homes; and some thirty did proceed with tinting.

There was no discussion by Grieve with those who had the tinting done and releases apparently were signed with all being satisfied. The seven houses before the Tribunal are not particularly different than the others, said Grieve.

Grieve reviewed his procedure for his reports which included elevation sketches of each side of each home. He used "red" to show brick mismatch, "orange" for mortar splash, "blue" for mortar mismatch and "green" for cracks as each home was inspected.

The quality of mortar seemed suitable to Grieve and he believes that tinting with some minor brick replacement would resolve the concerns of the owners.

Grieve reviewed his sorting out of mortar splash, mortar mismatch and brick mismatch items through his division of each wall into several areas. The sample house chosen for a full tinting was of a lighter colour where problems showed clearly and a tinting of a slightly darker colour would clearly show the success of the process. Grieve presented photos of this home taken on October 10, 1990, which was some eighteen months after the tinting was done and he said that no fading of colour has occurred.

Power washing, wire brushing and repointing were all done for the homes and the tinting cost is about \$5,000 for each one. Each of the seven properties was referred to with its own percentage of splashes and mismatches. Grieve believes that the mortar strength is satisfactory for the houses and that tinting will resolve most concerns about appearance. For the 135 degree angles on the rear elevations, Grieve would use an elastic material which looks like rubber and would look different than would repointed mortar.

Grieve used the RPR meter to test mortar strength on the seven homes in late 1989. If the mortar was hard and the results were low, then Grieve expected that the tinting would take to the bricks and to the mortar very well.

Grieve was not concerned with the strength of any original mortar since the power washing had cleared out any inferior mortar, and he found any tuck-pointing mortar to be of adequate quality. Grieve said that clay brick would absorb eight times as much water when immersed for a minute as will concrete brick. Therefore, concrete bricks laid in winter may have had the mortar frozen overnight which then flaked off somewhat. Since some tuck-pointing is sloppy, aesthetic problems remain for some owners, he said. Grieve was startled by the J.T. Donald test results, as he found the mortar adequate after it went through the power

washing and after he made his scratch tests. In December 1989, he went with Pal to give samples of original mortar for testing.

He found any test results of 10:1 and 9:1 to be unbelievable, since mortar is mixed on site as bricks are laid and any mason could not trowel gritty mortar of a 6:1 ratio or greater.

For Grieve, there could be no cost saving by using less masonry cement, since the masons could not lay bricks fast or well with such a mixture and, therefore, their labour costs would increase for the builder. A ratio of 3:1 is a self-governing standard, said Grieve.

Grieve sent his samples to the Ortech laboratory since he has used their services for ten years and found the tests valid with consistent results of quality work. A control sample of 3:1 mortar was sent to both Ortech and J.T. Donald for analysis. The results of the Ortech tests showed Grieve that the mortar strength was consistent with his expectations.

Grieve confirmed that the Jennock Brick freeze/thaw cycle test had no relationship to concrete bricks. He finds Meipoom's results invalid, but that Suter could be correct over a 50-year cycle. Grieve did his own durability tests on tinted concrete bricks with a 50 cycle and found "no degradation of the colour tinting". Since the liquid is not a sealant, there is no effect from spalling and no maintenance concern. The brick will not weather over the years as well as the mortar, Grieve said. Since brick has a higher water suction than mortar, ice can form and expand where the face of the brick may break away.

Grieve is also familiar with the brick tie retrofitting plan, and would find such insertion to be suitable at a total cost of \$10 per tie.

On cross-examination, Grieve stated that he spent from one-half to two hours each over six to eight days to inspect the 55 homes. He confirmed that the brickmakers he spoke with used the tinting process and found it satisfactory. Grieve said that any repointed mortar should last as long as the masonry does which would be more than fifty years. He noted that tinting would be effective on both clay and concrete brick, and that actually concrete brick was more porous. He has seen some ten-year old tinting projects and is satisfied with the results and that there is no deterioration.

Kuntze was the Ortech representative for this project after Pal called him in April 1990. He reviewed the J.T. Donald and Ortech reports. He has been closely associated with ASTM

committees for years and knows of Committee "C9" which set up the "C-85" test. This is not a mortar test, he said, but is meant to test the cement content of hardened Portland cement concrete. However, even if this test was used, it should by October 1987 have been the "C1084" test which replaced the earlier test and is the present approved one.

Kuntze places no reliance whatsoever on these tests. He said that there is no ASTM standard for the physical properties of hardened mortar removed from a structure. He reviewed the components of the Ortech tests which he said can by spectroscope read the parts per million of the various substances in the mixture. All elements are sorted out and their ratios are then calculated; and Kuntze found a +5 to -9 percent variance for the samples. He believes that the Ortech test is correct and is the type of procedure which ASTM would build up to an approved test for mortar strength.

Shilling took his instructions from Grieve and did tuck-pointing and brick repair on the homes. He was to repair those below average for the subdivision. Where frost damage had occurred, he ground out mortar to 3/4" depth and put new mortar in using a "1-bag mixer", the mortar was prepared on site in a 3:1 ratio resulting from topping up the cylinder with 22 to 24 shovels of sand. Shilling uses 1 3/4 inch smooth galvanized large headed roofing nails for his brick ties. Longer nails would cause vibration of the stud and could pop the internal drywall screws as well as loosen lower layers of newly laid brick he said. He said that spiral nails were not usually used.

He finds mortar of a 2:1 mixture too "strong", and sticky and hard to work. Mortar of a 6:1 mixture he says is too "slow", not pliable and won't stay to fill joints. No money would be saved by skipping on cement he said, since the bricklaying crew would be slowed down and, therefore, lay fewer bricks in their shift. If the mixture was too weak, he said that the crew would rudely inform the mixer who also operates the fork-lift truck on site as they can tell what it should be by the look and feel as it is used.

In reviewing various photographs, Shilling saw many examples of inadequate work and would remove, replace, tie in and fill the various deficiencies. He saw much of the work to be below average in certain areas, and finds this due to a lack of skill or sloppy workmanship by the original masonry contractor.

On re-examination, Shilling said he had not been called back to any of 20 homes with complaints after the work was done. He believes that all of the owners' concerns can be remedied and that tinting would be very helpful. He sees the Hazell home as an

average one for the area and does not believe that it has to be rebricked.

Snowden came on the scene when the Construction Control Group was contacted by the builder, Brandy Lane to review the reports of the various inspections. He looked at 10 of the 90 homes to see the mortar situation. He saw some frost damage, cracks and overhangs of more than one inch. He took mortar samples of the Hazell home which has a particular "Baker Street" report of November 1, 1987 and of three other homes. Hazell also was included in the two further general "Baker Street" reports of November 24 and 25, 1987. As the matter of "extremely poor mortar mix along west wall" was referred to in that first report, Snowden included this in the samples sent to Ortech.

Snowden sent the results of the Ortech test to Brandy Lane on June 6, 1988. He suggested that further sampling be done to get a broader range for greater accuracy. He said that soft mortar can result from frost damage due to winter work without protection or because the bond is not good due to flash setting or because the sand to cement ratio is too high. If the damage is solely due to frost, then he said that power jetting will clear out that weak mortar. He found with the nozzle some 8 to 9 inches away that weak mortar up to 3/8" would come out.

He did not see frost damage on the Hazell house, and thought that any other mortar concerns were due to the other two factors.

Snowden said that the seven Applicants' homes were all done and in some places, more than 3/8" of mortar was removed. At no time did all the mortar in a joint come loose and some joints had to be ground out. He found that frost was the primary cause of mortar damage for the group of homes. Snowden finds that power washing confirms that the mortar strength is adequate on all of these homes.

Snowden considered weep holes, head joints, flashing, lack of freezing protection and overhanging for each of the homes and in his report to Brandy Lane on October 18, 1988, he confirmed the statement therein that:

The investigation and restoration procedures are carried out to the exterior brick work were monitored by representatives of the Construction Control Group and based upon our observations we are satisfied that the work was carried out satisfactorily and the exterior brick work

of this building has been restored to a sound, weathertight and durable condition.

On cross-examination, Snowden said that since there has been no collapse or shift in the walls since October 1988, he assumes that the houses are structurally sound. He said that the quality of work was equal to the current work in a Toronto-area subdivision, even with 80 of 90 homes requiring repairs.

Gray has franchises for his products in various parts of Ontario, but keeps the Metropolitan Toronto area for himself. The products are water-based and "aspiratory" and do not seal the brick. He claims 100% success over 19 years of activities and he disagrees with Suter's view and believes that those comments refer to a painting sealant. A 25-year Warranty is offered and tinting has no effect on the integrity of the brick.

He said that he has endorsements from the Brick Institute of America for his process, as well as from Ontario contractors and many brick manufacturers. The cost of the process can range from \$200 up to \$4,500 when the entire house is cleaned and tinted.

After completing the evidence on behalf of the New Home Warranty Program, counsel for four of the appellants sought to call further evidence in reply. That Proposal was refused by the Tribunal and the Reasons for the Ruling are to be printed in the CRAT Annual volume immediately following this decision.

In her argument, counsel for four of the appellants noted that the Program's offer to each of her clients was made in June 1989 based on Pal's view of the structural needs and Grieve's view of the aesthetic repairs. The Program has not changed its offer over the past two years.

She saw the 55 inspections done over five or six days by them to be cursory without ladder, plumb line, level or binoculars. She saw the details of the reports as incomplete with dates and items changed. Pal's pro forma 1-page on each house, she finds superficial. She believes that the Program did not instruct Pal and Grieve as to their duties and that there is no evidence as to how many times these houses have been already repaired. If the repairs are to last from 20 to 50 years, she wonders why the inspectors even today do not know what work was done.

She would go beyond Part 9 of the Ontario Building Code to the Warranty in section 13(1) of the Statute which states:

13.(1) Every vendor of a home warrants
to the owner

(a) that the home,

(i) is constructed in a workmanlike
manner and is free from defects in
material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with
the Ontario Building Code;

(b) that the home is free of major structural
defects as defined by the regulations;
and

(c) such other warranties as are prescribed
by the regulations.

She particularly directs the Tribunal's attention to sub-
items (i) and (iii) of the warranty section.

On the view that this subdivision is no better or worse
than the average in Ontario, she asks how this could be when nearly
all of the homes needed repair work. She finds Pal's answers on
the deficiencies of the 135 degree angle cracks and brickwork
particularly vague.

In comparing Suter to Pal, she notes that Suter is the
pre-eminent expert available for masonry veneer opinions, while Pal
has no committee memberships or publications and no comparable
qualifications. She notes that Pal states that reinforcement ties
in the angles are not needed, while her other witnesses would do
that work routinely to stop cracking. She states that while Suter
sees the prospect of serious problems developing, Pal can only say
that the work is no worse than other homes.

In her view, much more is needed than repointing and
tinting.

Overhang concerns, weephole spacing and lack thereof,
brick tie retrofit and reconstruction are all needed now, she said.
Earlier repairs here failed and the walls need to be replaced, in
her view. The houses must be brought up to the standards required
by the Ontario Building Code and not just patched with future

maintenance concerns.

In addition to the items which the Program would repair, she notes the denial of claims for wall misalignment, unfilled mortar head joints, cracks, mortar droppings and the tooling of joints. No remedy is offered for the 135 degree angle repairs, or the crooked sills and brick courses and any deficiency in the mortar is simply denied, she said.

In her submission, she stated that even if the mortar was sound which is denied, full rebricking is needed. Original products were not tested and variances can occur with similar products. She questions the reliability of the Program's tests. As for the results of the power washing, the lack of consistent supervision for that process shows that either the tests done were incorrect or the power wash process was inadequate or perhaps both.

She believes that the end result of the various mortar scratch tests and breaking of samples are inconclusive. However, her clients' homes have suffered damages from clear breaches of warranty. There are immediate problems shown by dozens of photographs of these items. Long term problems of safety, durability and serviceability of the brick veneer are also of concern. Tinting and repointing will not cure any further deterioration, but will only mask the problems, in her view.

The reports of Pal, Grieve, Meipoom and Suter all show to her much cracking and this has increased even if Pal says that it is no worse than elsewhere. No remedy is offered by the Program for this, or for window sill and wall misalignments.

Counsel referred the Tribunal to the decision of Dan Vera (1987) 16 CRAT 183, which also was a claim made for brickwork and where the Tribunal stated when re-bricking was ordered:

In the opinion of the Tribunal, aesthetic considerations may be less important than structural ones. Aesthetic outrages do not render homes uninhabitable. But we consider that the problems revealed by the evidence in this case show not just poor workmanship, but outrageously dreadful workmanship. We would be remiss in our duty to the consuming public of Ontario were we to decide that such a low standard of competence in the laying of bricks is acceptable or that the owners of new homes, as contemplated by the statute should be forced to put up with such shoddiness or

any kind of half-adequate partial rectification of the problem such as we consider the Warranty Program's recommended curative measures to be. In our view, the walls of this house which have been the subject of this case constitute a textbook example of how not to lay bricks. If some student enrolled in an elementary beginner's course in bricklaying had submitted as an exercise a piece of work of this quality he or she would quite possibly be failed and perhaps transferred to some other less challenging course.

No consumer should be asked to endure such shoddy workmanship or in consequence thereof to suffer the resulting pecuniary reduction in the market value of his home. The Applicant has experienced the inconvenience of having remedial work done on his home already. He and his family ought not to be put through this a second time, and then perhaps, later on, a third time. Mr. Poirier's stated idea of an acceptable standard does not impress the Tribunal as appropriate.

A second claim of poor brickwork was cited in the decision of Robert J. Bohan (1987) 16 CRAT 138, where again by photographs and other commentary, the defects and lack of workmanlike actions were explained. In this decision, the Tribunal again ordered re-bricking and stated:

After considering all of the evidence before it, the Tribunal has come to the conclusion that on the particular facts of this case, there has been a breach of the statutory warranty. In arriving at this conclusion, the Tribunal has taken into account the cumulative effect of all of the various defects in the brickwork. The overall workmanship of the brickwork, in the Tribunal's view, falls below the standard that could reasonably be expected by a purchaser of a new home and below the standard that is required by the statutory warranty set out in Section 13(1)(a)(i) of the Act.

It is the Tribunal's view that compliance with the requirements of the Ontario Building Code alone is not sufficient to satisfy the requirements of the Act. Compliance with the Ontario Building Code is required by Section 13(1)(a)(iii) of the Act, that is, such compliance is sufficient to satisfy only one branch of the statutory warranty. Similarly, while the fact that the bricks protect the home from the weather probably satisfies the statutory requirements imposed on the vendor by Section 13(1)(a)(ii) of that Act, that is, the warranty that the premises are fit for habitation, the warranty provided for by Section 13(1)(a)(i) is not necessarily also satisfied. The Tribunal considers that bricks are not simply there to weatherproof the house, but also serve the function of contributing to the appearance of the house, a function which this Tribunal considers to be a legitimate one, and one which is within the statutory protection of Section 13(1)(a)(i). In some cases, where the particular facts warrant (as they do in the case that is now before the Tribunal), the statutory warranty provided for in Section 13(1)(a)(i) may be breached where the defects in workmanship and/or materials result in a significantly negative effect on the appearance of a home.

Counsel completed her comments by stating that the tinting process as offered has limits and will only mask the problems. She rejects minor repairs and believes that the New Home Warranty Program should have higher standards where the durability of her clients' homes has been compromised.

Campbell asked the Tribunal to provide to him the new home which was bought without any expectation that tuck pointing and tinting would be needed within two years. This is the major purchase a person makes, he said, and a message must be sent to builders who have poor standards of quality.

Hazell also stated that while he did not expect problems with a new home, he has had them since May 1987. The final offer he received from the Program was for \$2,850 on June 27, 1989, and he finds minor repairs unacceptable. His deficiencies are set out

in the Meipoom and Suter reports and they include misalignment of walls, soft mortar, cracks and mortar mismatch from repair work. He said that any mortar tests done on his home were not done on original mortar. No ladder was used in the Pal inspection so that upper level deficiencies were not viewed. He sees step cracks and separations of brick on his home. His home is falling apart, he said and he wants to have it rebricked.

In his opinion, tinting will not remedy his problems of weak mortar, wide joints, cracks and misalignment.

Mrs. Rocchina Bertuzzi stated that her taxes were reduced due to the loss of value of her home and she also wants complete rebricking. She said that a new home should not need such restoration and the grinding and repointing is not enough.

Counsel for the Program summarized the claims of the seven owners who bought in 1986 and occupied in 1987. The issue of the quality of mortar was claimed in the Baker Street reports and became part of the Conciliation Reports. The offers to settle, he said, included the correction by the Program of weephole spacing and additions, brick tie placing in the three garages, mortar smears and splatters and mismatched brick by tinting and overhang concerns, as well as repointing cracks. Indeed, the Program will accept the Meipoom comments for all of these matters since his reports are the most detailed.

For the other complaints, the Program rejects them as they are claimed more than one year from occupancy and must, therefore, be major structural defects in order to be warranted. The Program states the brick ties are not inadequate and not unsafe, and that the strength of mortar is satisfactory so there is no damage and no claim. The plumbness of walls was not mentioned in the first year although if it had been, some repairs would no doubt have been included by the Program. As there is no major structural defect, he said that no warranty should be broadly applied although Pal does admit certain particular work is required.

As to the lack of air spacing behind the veneer walls and the mortar droppings, both shown in the garage photographs, counsel said that there is no major structural defect here, that no damages have been shown and that, therefore, there was no warranted claim.

In his opinion, the quality of the mortar is the sole determinant as to whether or not rebricking should occur. This claim was within the first year and is a valid one and if the mortar is no good, replacement must occur. It has, therefore,

taken 30 days of evidence to get to the point of deciding what the mortar quality was in 1987 and what it is today, he said.

He disagrees with the view that the evidence is inconclusive on this point. If it is, then the claimants have simply not proven their claim. But it is not, as the Ortech testing proves that contention. Random samples from ten homes were tested by Snowden and after power washing was done, no inadequate mortar could remain in place, in his view.

Snowden found one section of one wall which had weak mortar and would replace that area only. Since Snowden would not tuck point on weak mortar, the mortar in each house must be sound, he said.

Further complaints from the owners led to the Meipoom and J.T. Donald reports. Counsel would reject these with their out-of-date tests and rely on the Ortech and Kuntze reports as being correct.

He believes that Kuntze explained Ortech's tests and refuted any opinions which Mortenson advanced. The older test methods are not now in use, and Kuntze's 30-year reputation is to be relied upon. Therefore, the original mortar is sound, in his opinion.

Any testing by scratching is inconclusive, he said, and he finds Meipoom and Suter wrong in their opinions since they rely on the J.T. Donald reports which are initially wrong, he said.

He finds the Bertuzzi result of 4:1 to be sound since the house was power washed and repointed and the brick pull out test done by Golder on Pal's request showed a range of 2:1 to 6:1 so that a safety margin is clearly there and there will be no problem.

Counsel stated that the second important category for warranty issue is that of the fastening of the brick veneer to the stud walls using brick ties. He notes that of the 21 items on Suter's checklist, not one refers to nails and there is no loose or bulging brickwork. For him, the evidence of all the brick tie pull out tests by Meipoom and Suter was unnecessary and irrelevant. There are no references to nail lengths in Part 9 of the Ontario Building Code and the usual use of 1 1/2" to 2 1/2" smooth large headed nails is a continuing adequate standard so that any thought that a 3" spiral nail is required is simply not proven by the real world, he said.

Counsel noted that no one had ever given evidence to the Tribunal that any bricks had pulled away or may do so due to

concerns about brick ties. He noted that Meipoom admitted this test was not approved and had no methodology for comparison and, indeed, had never been done before.

These homes have been built under the common practice of all Part 9 homes, and while some of these theories are interesting, their results are of no consequence in his opinion. Therefore, since there is no damage proven in any way, he called upon the Tribunal to reject any warranty claim based on such evidence.

In his view, Suter is wrong about mortar deficiency, wrong about nail pull outs, wrong about nail strengths, wrong about the tinting process and finally, wrong about trying to connect the PPR tests to any sand/cement ratio in mortar.

Counsel for the Program saw the issue of the width of mortar joints to be a minor aesthetic one. The Ontario Building Code calls for an average of 12mm width with none to be more than 20mm, he confirmed. For those one or two in a hundred which Pal says are greater than 20mm, counsel sees no damage having occurred and their look can be remedied by tinting.

While much of the Meipoom and Suter evidence refers to mortar cracks, counsel accepts Meipoom's elevation drawings and the Program will do the maintenance and repair which is normal for such typical hairline thermal cracks. No control joints are required for these Part 9 houses and any re-cracking can be repaired, he said. The use of an expandable filler in the 135 degree angles will assist in solving that concern as no one knows if these angles are tied together or not. Again these are all repairable matters, he said.

On the issue of misalignment of walls, he noted that Pal made several specific suggestions in certain areas. However, the claim is generally not made in the first year of occupancy and there is no major structural defect, so that no warranty should apply. There are no standards in Part 9 and, therefore, the CSA Standards given by Meipoom do not apply; however, the Program will make repairs as Pal suggests without admitting any liability to do so.

Counsel agrees that the spacing of some brick ties on the three garages is not as required by the Ontario Building Code. While again this was complained of after the first year and is not a major structural defect, and while there is no damage proven, the Program will install any needed ties by retrofitting as Pal and Grieve both suggest.

In addition, weepholes will be added and plugged ones

cleaned out on the same terms since there is no warranty after the first year and no damage is proven although this is an infraction of the Ontario Building Code.

On the theme of tuck pointing and the tooling of mortar joints, counsel states that the joints do not have to be concave and that the power wash may have roughened some surfaces. Any mismatch in mortar colour will be attended to by tinting he said, which will also resolve any concerns of mortar smears or splatters and brick mismatch.

On the issue of the air space behind the brick veneer being less than 25mm as required by the Ontario Building Code and on the issue of whether mortar droppings are excessive, counsel said that these issues were raised after the first year and would have to be major structural defects in order to be warranted. Since there are no defects which would cause the wall to fail and no damages proven in any event, counsel stated that the Program rejects these as being under any warranty.

Again, any claim with respect to unfilled mortar head joints would have to have been advanced in the first year as the concerns of Suter are a fear and not a problem. Repointing of these joints after a power wash will make them sound, said counsel. The Program accepts the opinion of Pal about any brick overhang and metal bracing angles and caulking will be done as required.

On the adequacy of brick tinting, counsel recommends the strong evidence of Gray as to much success over the years on many locations. He suggests that the views of Meipoom and Suter be discarded since the record of tinting without complaints and with no evidence of failure has been put before the Tribunal. He noted that Gray had countered Meipoom's three concerns in that there is no degradation in concrete brick, no fading at different rates and no problem with the mortar taking and holding the colour as applied.

Finally, counsel suggested that the PPR meter testing by Meipoom and the reversals shown in the two pairs of charts prove that these calculations were worthless. Since the tests were incorrect, the propriety and effectiveness of them was of no value to the hearing, in his opinion.

On the credibility of witnesses, counsel for the Program found Meipoom to be wrong on the PPR tests and on his four charts, wrong on the effects of tinting and wrong on the whole exercise about the value of nail pull out tests. He also questioned Suter's reliance on Meipoom's tests and said that the whole discussion of safety factors was worthless. He said that Suter was wrong in

tinting and on the application of metal brick ties, and that his reliance on the J.T. Donald tests is incorrect, since these bricks will not fall out and the mortar is not deficient. The evidence of Kuntze is to be clearly preferred over that of Mortenson, he said.

For his own part, he noted that Pal is involved with house inspections daily and sees the reality of construction and knows the standards to apply. The evidence of Grieve on tinting was confirmed by Gray, and Kuntze's qualifications on mortar testing are impeccable. Snowden and Shilling gave evidence of mortar strength and building practices which the Tribunal should accept, he said.

In conclusion, counsel for the Program said that these seven homes do not need to be rebricked, that the mortar used in their construction is adequate, sound and durable and that the brick veneer is adequately fastened to the wood frame.

He noted that a number of specific defects have been admitted by the Program which accepts the obligation to attend to them. In addition, those items of missing garage brick ties and weepholes as set out by him which the Program will repair without obligation, are acknowledged.

In reply, counsel for four of the Applicants questioned the validity of the tinting procedures and the guarantee of that process. She noted that brick ties could be missing in other parts of the home and that safety factors over the long term are an important consideration for the Tribunal to decide upon.

The Tribunal concludes from the evidence that these seven homes have not been constructed in a workmanlike manner and are not free from defects in material and further that they are not constructed in accordance with the Ontario Building Code.

Many of the 135 degree angles on the rear elevations of these homes have re-opened two or three times, and the structure of these is suspect. To achieve a proper result, these sections of wall will have to be pulled down.

From a survey of all of the photographs, we see for each property Ontario Building Code violations with lack of weepholes or clogged ones which need cleaning, brick tie spacing concerns, brick overhang, smears and splatters of mortar, severe cracking over wide mortar joints and unfilled mortar head joints. In addition, there are many sections of walls out of plumb. Extensive repair to try to remedy all of these concerns will again require many areas of brick to be pulled down.

Many areas of these homes have brick mismatch and we have evidence to show where window sills and off-level courses of brick will also have to be pulled down.

The evidence of the soundness of the mortar in these homes cannot be conclusive. We are not satisfied that the Ortech tests were done on original mortar in these homes and we question the J.T. Donald Chemical tests which do not confirm the correct composition of the mortar. We do find that much of the mortar did crumble and that even after repointing on up to three occasions, mortar in these homes has gradually shown deterioration. Repair work already done in these homes has been unsatisfactory.

The Program seeks to repair many problems, but even with these repairs and with the overall tinting to blend them into the house, we find the brickwork would not be of a standard which should be expected in Ontario.

We were told that the brickwork in these houses was no worse than anywhere else. If that is correct, then a message must go to the home builders of Ontario that their standards are not good enough. Evidence here shows walls and window sills which are atrociously built.

The Tribunal accepts tinting as a proven method of improving the appearance of a home. However in these homes, that process will only camouflage a variety of problems after more mismatched bricks are filled in to repair areas. In addition, the tinting process does nothing for the need to rebrick all the 135 degree angles. The Tribunal accepts the evidence that brick ties are properly nailed with 1 1/2" to 2 1/2" smooth nails and sees no need for any 3" or greater spiral nails to be used in this procedure.

The overall standard of these homes is much below the quality which should be expected by buyers in Ontario. If the original complaints had been fully addressed years ago, these owners would not have been put through such difficulties.

These homeowners have rejected any cash settlement of their concerns and they ask only that their homes be rebricked. We will hold them to their desires. We find that these homes have been built in breach of the warranties in Section 13(1)(a)(i) and 13(1)(a)(iii) of the Ontario New Home Warranties Plan Act.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the

claims of the seven applicants and to remedy the defective brickwork by forthwith removing all of the existing brick and re-bricking the houses with good quality brick of a comparable type as chosen by each owner and to repoint and tint each fireplace as may be required to attend to mortar smear and splatter as well as joint width concerns; and the Tribunal further directs that no cash settlement be made for these properties but that the re-bricking is in fact done.

MR. AND MRS. D. BISHOP

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:
EUGENE TRASEWICK, representing the Applicants
MARTY SCHMERZ, representing Presidential Homes Ltd.
BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATES OF 3 June and
HEARING: 11 September 1991 Toronto

REASONS FOR DECISION AND ORDER

Dale and Arlene Bishop purchased a new home from Presidential Homes (Westfield Estates) Limited in early 1987. The property was one of 32 homes in this subdivision in Stouffville. For \$279,000, the Bishops obtained a 2-storey home at 364 Cam Fella Blvd. with some 3,300 sq.ft. of living area with four bedrooms and 2 and one-half bathrooms.

The home was enrolled in the Ontario New Home Warranty Program and the hearing of the claim formed part of a builder registration revocation hearing.

Various complaints from Mr. and Mrs. Bishop were made in a letter of February 4, 1988, but their major concern was the brickwork on their home. They were concerned with the quality of construction and with the quality of the bricks themselves. Mr. Bishop wrote on June 8, 1988 to the Program:

We do not believe this brick is French Silver to start with and when it gets wet, it goes a horrible dark colour and stays that way for days (photograph enclosed). Also the brick itself is know (sic) as

culls or seconds, for they have chipped corners and are different sizes and irregular shapes.

A conciliation inspection took place on January 11, 1989 and the first item on Schedule "A(2)" (items not covered under warranty) is:

COMPLAINT - Brick work.

OBSERVATION - The homeowner's main concern with regard to this complaint is that the brick is not the colour French Silver, as originally ordered, is concerned with the quality of the brick and that the builder has not begun to replace the brick on the entire home, as originally promised.

COMMENT - Colour is not a consideration of the Ontario Building code and I am unable to determine any defect in the quality of the brick material at the time of this conciliation. However, the builder has agreed, by letter, to re-brick the entire house and is expected to honour his commitments. Homeowner also realises that this item is considered seasonal and will contact the Warranty Program, in writing, after May 31, 1989 if the warrantable concerns re cracks in mortar joints, insufficient weep holes, wide mortar joints, brick overhanging foundation wall excessively, brick work being concaved in an outward direction excessively, and Item No. 3 on Schedule A(2) of this report have not been corrected.

The warrantable concerns on that item were to have been corrected. That report went to the builder ("Presidential") on January 17, 1989. A second conciliation took place on September 8, 1989 and the following Item 1 appears on the Schedule "A(1)" (Items covered under warranty):

COMPLAINT - Poor brickwork.

OBSERVATION - The exterior brick veneer is comprised of concrete brick varying in

degrees of texture from predominantly rough-faced to the occasional smooth-faced (appropriately intermixed), and in general, the brickwork is considered acceptable with the following exceptions:

(a) The Builder has commenced with remedial action by relaying the front wall of the garage; however, approximately three dozen smooth-faced bricks of a much lighter colour have been randomly intermixed to this gable end, resulting in an aesthetic effect not consistent with the rest of the existing brickwork.

(b) An excessive full height vertical crack at the junction (not keyed) of the house and the garage's east wall.

(c) The unacceptable installation of broken bricks and excessively wide head joints at soffit level, to the south end of the garage's east wall.

(d) Excessively wide head joints to various areas throughout, but most notably to the upper west side of the northwest quoining corner to the house.

(e) The unacceptable plumb line of the quoining at the northwest corner.

(f) The workmanship of the vertical junction at the outside corners, as well as the excessive overhang atop the foundation walls, at the rear bay projection.

(g) The cracked mortar joints at the following locations: (i) extending from the upper left corner of the rear entry door to the garage; (ii) adjacent the quoining at the north end of the garage's west wall; (iii) extending from the window sill to the top of the foundation on the west wall of the garage. These conditions may be attributable to the two cracks that extend from the top of this foundation wall to an undetermined point below grade.

(h) The entire brickwork requires a professional cleaning and a number of minor voids to head joints are evident at various locations throughout.

No repairs were made as required of the builder and the New Home Warranty Program's recommendations in the reinspection report were not accepted by the Bishops as sufficient to resolve their complaint. That decision is appealed to the Tribunal.

Mrs. Bishop provided the Tribunal with 15 photographs taken by her and reviewed various flaws which they portrayed. She noted that bricks in the front have chipped corners and vary in length. The construction on the west corner of the porch is out of level by 1/4" in two feet. Mortar joints varied in width from 1/4" to 3/4". On the east side of the porch, she noted that bricks had cracked as had vertical patching. On the east side of the living room, mortar joints vary from 1/4" to 1 and 1/8", and patching repairs are done in a dissimilar mortar whose colour and texture vary from the original.

Also, foundation cracks were apparent along the west side of the garage where sloppy repairs have opened up again. Step cracks were shown to the Tribunal, and gaps and cracks in the brickwork at the eaves is clearly seen. Vertical cracks have been poorly repaired and have reopened. Mrs. Bishop stated that the brickwork was done over several weeks in the winter of 1988 without any weather protection, and with only several rows of brick being put in place at a time.

The photograph of the wooden decorative circle under the peak of the front roof shows sloppily cut brick, carelessly installed, with mortar smeared over adjoining bricks and on to the aluminum trim. Mrs. Bishop concluded that no care was taken by the bricklayers on her home and that any attempts to repair have been unsuccessful. She wants her home re-bricked and would prefer another brick to be used. For her, the variety of problems cannot be fixed by any repair procedure which will only leave a patch job.

On cross-examination, she said that on visiting the sales office, no brick sample was attractive and she picked the french silver grey brick at another Presidential subdivision offered. An example was shown to her, but she claims that the brick as put on the house was not what she chose or expected. There was no extra cost for this clay brick. She complained to the Builder's representative and to the showroom salesperson about the colour as construction proceeded.

Murray Balshin ("Balshin") completed an inspection of the brickwork in a report of January 30, 1988 which went into the Program. He confirmed that the bricks used were "French Silver" calcite bricks and wrote of brick with 60% chipped corners and not being square and also with broken and curved ends. He wrote that the bricks were not of first quality and called them "culls". On the rear wall, he found 21 and 1/4 courses of brick on one side of the bay window and 21 and 3/4 courses on the other.

He reinspected the property and reported again on January 13, 1991. He repeated his earlier observations and stressed width of head joints, plumbness concerns and courses being off level.

Mr. Balshin was graduated as an Engineer from the University of Toronto in 1946 and built some 1800 homes in his career. He now has a Home Inspection business and has done some 15,000 inspections of properties. He reviewed his two visits of January 30, 1988 and January 13, 1991 and repeated the comments in his written reports. He particularly noted the protusion variance in the brick window sills which ranges from 5mm to 22mm over five windows. In his opinion, piecemeal repairs are not enough and he would remove the present brick and replace the whole job.

David Betts has been a conciliator for 10 years with the New Home Warranty Program. He often is called upon to give second opinions on various claims and views some 200 properties in a year. In the second conciliation inspection of September 8, 1989, the brickwork issue was moved to the "A(1)" Schedule because the builder had not acted as expected to re-brick the house. Some repair work had been done by the builder. Betts stated that the repairs were done within standards considering that the brick is irregular with random rough and smooth faces. While the repair work was a reasonable job, Betts said that there was brick mismatch and those bricks should be removed and replaced or tinting should be done. He acknowledged that the Program knew that the Bishops wanted a complete re-bricking of their home, and that they saw remedial work as a waste of money. The cost of doing repairs with tuck pointing and foundation cracks would be from \$5,000 to \$6,000, Betts said. There were no concerns about quality of mortar or brick ties, he stated.

Tibor Pal is a structural engineer and on behalf of the Program visited the Bishop home in January 1991. He had both conciliation reports and the Balshin report of January 30, 1988 to review. He stated that the brickwork used is concrete and has a rough surface with some extrusion overflow so that a rustic appearance is given when the brick is laid with extruded mortar. The brick size is standard with corners and edges purposely irregular. The front of the house has raked mortar joints while

the other three sides have shallow concave mortar joints.

To Pal, the brickwork was satisfactory and on his further investigation, he had confirmed by the brick manufacturer that the bricks were guaranteed to meet all C.S.A. standards for concrete (calcite) brick. Pal saw a 5% problem with mortar joints and since the C.S.A. standard allows a 4 mm range plus or minus, the variation in brick lengths was acceptable. Pal noted many cracks and weep-hole problems, but said that the bricks are not seconds or culls and that there was no need to fully re-brick the house.

As a witness for the Builder, Kathleen McCart presented an exterior and paint selection form which Mrs. Bishop had signed on August 10, 1987. Ms. McCart is the Construction and Contracts Manager and the Co-ordinator of Payments for the Builder since January 1988. Her evidence was presented to show that the Bishops had chosen "French Silver Gray" brick a month before the interior colour scheme was decided on September 15, 1987. She said that while all the other houses have clay brick, this one alone was a separate order of calcite brick from another supplier. She noted that the brick had a rough surface and extrusions made raking of the mortar joints not possible. The brick as chosen was ordered and installed so the Bishops received what they sought, she said.

From the photographic evidence, the Tribunal is able to conclude that the brickwork on the Bishop's home is well below an acceptable standard. The quality of workmanship is poor and we find an obligation on the Program pursuant to Section 13(1)(a)(i). In addition, we have had presented in evidence three letters from solicitors for the Builder which speak of acceptance that the brickwork is of very poor workmanship and which offer a complete re-bricking of the house. While any commitment at that time may well have been overtaken by further discussions, the Tribunal must at least accept a Builder's own recognition that work had to be done.

The Tribunal finds that repairs at some \$5,000 or \$6,000 will not meet the standards which should be maintained. Therefore by virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal Orders that the Program allow the claim and have the house re-bricked using the same style and type of brick as originally supplied, and that the obvious foundation cracks be repaired as part of the total work.

MANFRED AND KARIN BORCHERT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN HURLBURT, Member

APPEARANCES:
MANFRED AND KARIN BORCHERT, appearing on their behalf
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF 26 October 1990
HEARING: 15 March; 1, 2 October 1991 Toronto

REASONS FOR DECISION AND ORDER

An agreement was entered into between Mr. and Mrs. Borchert and a builder, Brasswood Homes Inc. under date of June 16, 1986 to construct a home for the Borcherts in Nobleton, Ontario pursuant to architectural plans produced by an architect engaged by the Borcherts. There is no doubt that the Borcherts did require the builder to provide some extras and to make some changes in the construction of their home. What was conflicting in evidence, however, was when these changes and extras were requested and the value in regard thereto.

There is also no doubt that the Borcherts held back monies in respect to the final payments in respect to the completion of the contract, but there is a difference as to the amount of such holdback calculation dependent upon the value assigned to any extras and changes requested by the Borcherts.

There is also undisputed evidence that certain repairs had to be conducted under the warranty contained in the Ontario New Home Warranties Plan Act. Again there is a question as to the amount of such repairs and the value thereof.

The Tribunal is satisfied that the Borcherts had considerable difficulty with their builder with regard to the completion of their home and the Tribunal was impressed with the

evidence of Mr. Borchert given before this lengthy and prolonged hearing. Therefore, when there is a question of uncorroborated evidence as between the builder and Mr. Borchert, the Tribunal has given the Borcherts the benefit of Mr. Borchert's testimony as against that of the builder and the builder's representatives.

That having been said, however, the Tribunal has had to consider the position of the Borcherts in respect to their claim against the Program because the claim can only be in respect of financial loss actually incurred by the Borcherts in respect to uncompleted matters and matters requiring repairs and only to the extent to which such claims exceed monies properly owing on the construction contract and held back by the Borcherts.

The Borcherts in asserting their claim submitted to the Tribunal that Brasswood Homes Inc. and, therefore, the Program owe to them for completion and warranted repair an amount of \$48,687.69. In the course of the hearing before the Tribunal, however, it was acknowledged by the Borcherts that there was a duplicated charge with respect to topsoil seeding and grading in relation to the lot and the septic bed tank of \$5,100.00.

In addition, there were architect's inspection fees and legal fees throughout the period totalling \$4,482.89, which the Borcherts conceded are not allowable by reason of previous decisions of this Tribunal.

Furthermore, in the course of evidence presented to the Tribunal, the Borcherts acknowledged that there were some extras for which the builder should be compensated which altered the amount of the holdback from the \$12,300.00 allowed by the Borcherts to a figure of \$21,482.00 which would further reduce their claim by an amount of \$9,182.00.

On this basis, therefore, the Borcherts' claim against the Program was reduced to \$29,922.80. Included in this claim, however, was a very vague estimate by a contractor which was not substantiated before the Tribunal and which was in the amount of \$16,800.00. Many of the items referred to in that estimate were, in fact, allowed by the Program. Nor did the Borcherts make any allowance with respect to the replacement of broadloom in the house with hardwood and an upgrading of the underpad, maintaining in their evidence, that the builder was prepared to do this at no charge. This claim on the part of the builder for this change was \$5,585.85. Nor did the Borcherts allow anything for the major ceiling change in the cathedral ceiling which the Tribunal is satisfied was clearly a change occurring during the course of construction and for which the builder claimed an additional amount of \$9,130.98 as determined by the Program.

Furthermore, the Borcherts did not make any allowance for additional bricks which were left on the site for their use, but which the builder testified had to be ordered specially and also with respect to the change from wood panelling to brick under windows in the house. The builder, as allowed by the Program, claimed an additional cost of \$2,320.00.

These extras assessed by the Program amounted to \$17,036.83 and, if allowed would further reduce the claim of the Borcherts against the Program to an amount of \$12,885.97, included in which amount is the questionable \$16,800 repair estimate. If the Program's position is correct, therefore, then the Borcherts might well be in the position of having ample funds on hand to cover the costs of completion and of repairs, and having suffered, therefore, no financial loss would not be entitled to compensation from the Warranty Program.

The Tribunal has, therefore, reviewed the decision of the Program contained in its letter of February 16, 1990 in which the Program denied the claim for compensation on the basis that the Borcherts had not suffered a financial loss.

The Tribunal has considered the evidence with respect to each of the items as set out including the summary of the Program. The Program concluded in its assessment of the Borcherts' claim that additional items had been contracted by the Borcherts from the builder in the amount of \$17,488.83 so that the contract price of \$210,300.00 being increased by that amount came to a total contract price of \$236,518.83. The Program acknowledged that the Borcherts had made payments totalling \$198,000.00 and, therefore, there was a holdback for a balance owing on the contract of \$38,518.83.

The Program proceeded to estimate the costs for completion of \$13,664.89, costs of repairs of \$5,003.57 and money spent by the owner of \$792.07 for a total cost to complete and repair of \$19,460.53, which they deducted from the holdback of \$38,518.83 to come to the conclusion that the Borcherts held monies in excess of completion and repairs of \$19,058.38.

In assessing the claim of the Borcherts as against the allowances made by the Program for additions to the contract and the deductions of costs to complete repairs, the Tribunal has carefully considered the evidence presented to it recognizing that the onus to prove the claim is upon the Applicants Mr and Mrs. Borchert.

There is no doubt that the contract price was originally \$210,300.00. All of the parties before the Tribunal agreed that

the extras allowed by the Program to the contract in the amount of \$4,922.00 were properly extras. There were further extras and allowances to those extras which resulted in a supplemental extra of \$3,808.00 and while it is noted in the Program's decision letter that this item is disputed by both parties with regards to value assigned, no evidence was presented to the Tribunal in this regard and the Tribunal, therefore, considers the \$3,808.00 to be a validly contracted extra.

In addition, the Borcherts acknowledged that there were certain permits and hot water tank which were properly charged to them totalling \$452.00 so that there is at this point in time an agreed upon contract price of \$219,482.00.

The first additional contract extra allowed by the Program was for hardwood strip flooring in the amount of \$5,585.85. There is no doubt from the evidence before the Tribunal that this was an agreed upon change to the contract. The Borcherts indicated that they were of the view that this was to be done at no charge, but the evidence of the builder's supervisor was to the effect that it would have to be approved by the principal of the builder and that it was not so allowed. The principal of the builder, Mr. Calitri vigorously confirmed that this was not agreed upon and stated that he had personally told the Borcherts this.

In analyzing the allowance which the Program made in the amount of \$5,585.85, the evidence indicated that the extra amounted to \$5,988.05, plus \$700.00 for travelling time to install less a credit for the original broadloom of \$1,476.20, plus an extra of \$374.00 for the extra padding which additions less credits amounted to \$5,585.85.

In examining the contract, however, in Schedule "A" thereof, paragraph 9(c) provided that there would be quality broadloom throughout certain rooms "or parquet". In the view of this Tribunal, the allowance which the Program allowed should have been the difference between parquet installation and hardwood strip flooring rather than broadloom and strip flooring. The Tribunal is not satisfied that the Borcherts should have been charged as an extra the \$5,585.85 as a result. Accordingly, the Tribunal is prepared to allow the builder the sum of \$943.00 only for an upgrade from parquet to hardwood strip flooring. The Tribunal is prepared, however, to allow the travelling charge of \$700.00 and the upgraded padding of \$374.00. The Tribunal, therefore, finds that the additional item to be charged to the contract for this matter should not be \$5,585.85, but rather the sum of \$2,017.00.

The next item which the Program allowed was for structural changes in living room cathedral ceiling after

completion of work as per original drawings in the amount of \$9,130.98. The Tribunal finds as a fact that the Borcherts authorized the change in the ceiling which necessitated certain structural changes. In examining the blue prints approved by the Building Department of the Municipality, it was noted that the Municipality had required additional strapping and insulation. There was confusion in the evidence as to when this addition was added and in the absence of direct evidence to the contrary, the Tribunal must assume these additions from the Building Department to have been inserted at the time of approving the Building Permit.

Mr. Calitri's evidence was that he picked up the plans shortly after the execution of the contract and reviewed the changes with the Borcherts. It is the view of the Tribunal that as these changes were Building Code changes required by the Building Department of the Municipality and they were required to be added to the architectural plans supplied by the Borcherts, the cost of such additional work would properly be an extra chargeable to the Borcherts.

The evidence of the builder, however, was that the roof was installed and only when the Borcherts requested the change in the collar ties was it necessary to remove the roof and reinstall it. The Tribunal gives the benefit of the evidence to the Borcherts in this regard and is of the view that the builder should be entitled to reimbursement for installing the roof strapping but once only - not for the additional replacement of the roof.

In addition, the Tribunal is satisfied that the builder should not have removed the roof collar ties when the plate collar ties either had not been installed or had been removed. It is the view of the Tribunal that the builder as a competent builder should have been aware that a sagging in the roof could occur and, therefore, have installed the collar ties at the final position before removing the roof collar ties. Had the builder done so, it might not have been necessary to install the extra wall and, accordingly, the Tribunal is not prepared to allow the builder for this cost.

There is no doubt, however, that the Borcherts required the collar ties to be dressed in mahogany and, accordingly the Tribunal is prepared to allow the builder for this item the sum of \$1,390.98, to allow the builder for the additional material for the cross purlins of \$1,000.00 and labour costs for removal of the top collar ties and installation of the cross purlins and collar beams, but at 50% of the charge shown, namely, \$3,270.00. In adding all of these items, the Tribunal concludes that there is a further extra to be allowed to the builder of \$5,660.98 rather than the \$9,130.98 assessed by the Program.

With respect to the next item for extra brick material and labour to replace wood panels under the windows which the Program allowed in the amount of \$2,320.00, the Tribunal is not satisfied that all of the bricks claimed to have been ordered were required. The Tribunal, however, is prepared to allow the builder for 1,000 bricks at \$400.00, the laying of the bricks \$650.00, an amount for tying the brickwork into the wall of \$750.00 and the steel angle iron of \$198.00 - for a total of \$1,998.00 less the credit which the builder was prepared to give of \$433.00 with respect to the plywood. On this basis, the Tribunal is prepared to allow as an extra to the contract, the sum of \$1,565.00 rather than the \$2,320.00 allowed by the Program.

Totalling all of these additional allowed extras, the Tribunal finds that the contract price between the builder and the homeowner is \$228,724.98. There is no dispute as to the amount of monies paid by the Borcherts in the amount of \$198,000.00. After deducting this amount, the Tribunal finds that there is a balance owing to the builder of \$30,724.98 which was held back by the Borcherts. The next portion of the Program's decision letter was a determination of the costs of items to complete the contract. The Program concluded that these amounted to \$13,664.89.

In the claim by the Borcherts with respect to grading, the Borcherts claimed after making an appropriate adjustment the sum of \$4,182.50. In addition, they claimed for the topsoil and machinery \$5,100.00 and for seeding some \$4,490.00. In respect to these items, therefore, the Borcherts made a claim of \$13,700.00 for which the Program allowed \$6,000.00. In part of that disallowance, the Program disallowed a claim by the builder for \$5,000.00 which also, therefore, became a benefit to the Borcherts.

With respect to the installation of the septic tank bed, the Borcherts claimed \$10,000.00 and the Program allowed \$3,000.00. The Tribunal is not satisfied that sufficient allowance was given to the Borcherts in respect of this item and is of the view that a further \$7,000.00 should be awarded to the Borcherts based upon the evidence given by the Borcherts of the work which had to be done. The Tribunal notes, however, that the topsoil imported on to the site was of a higher quality and, therefore, does not fully allow the Borcherts their claim. The amount which the Tribunal is prepared to allow in supplement to the \$13,664.89 assessed by the Program is the sum of \$7,000.00 so that the amount required to complete the contract is determined by the Tribunal to be \$20,664.89.

The next item estimated by the Program was in respect to repairs and it concluded that the amount required to effect repairs

would be \$5,003.57. In addition, it allowed the sum of \$792.07 to Mr. and Mrs. Borchert for work done by the homeowners in effecting repairs personally.

Included in the items to repair were items related to the solarium which totalled approximately \$400.00. The Tribunal is satisfied on the evidence given by Mr. Borchert and the photographic evidence supplied by him that substantially more damage occurred to the solarium than allowance has been given by the Program. Because of the vagueness of the repair estimate given by the Borcherts's proposed contractor, however, the Tribunal is not prepared to allow more than \$2,000.00 for this repair so that the Tribunal finds that the amount to allow the Borcherts for repairs, plus the work done by them personally should be \$7,795.64 rather than \$5,795.64.

Totalling the items required to be completed in the amount of \$20,664.89 and the items to be repaired totalling \$7,795.64, the Tribunal finds that the Borcherts are entitled to a claim of \$28,460.53. However, as indicated, the Tribunal has found that the Borcherts have held back the sum of \$30,724.98 as against the full contract price so that the Borcherts retain to their credit the sum of \$2,264.45. There being, therefore, no financial loss in the assessment by this Tribunal, the Borcherts have no further claim against the New Home Warranty Program in respect to the warranties provided under Section 13 of the Act.

An issue was also raised towards the conclusion of the hearing that the chimney may not be in accordance with Building Code requirements. If this is so, the error was contained in the drawings prepared by the Borcherts's architect and any cost of rectification would, therefore, be an extra for which the Borcherts would be liable to the builder. It is the view of this Tribunal, however, that a competent builder would have noted this violation of the Building Code and would have effected the change in the course of construction. Perhaps the balance owing by the Borcherts will be sufficient to rectify this item. In any event, it is the decision of this Tribunal that the Borcherts have no claim against the Program in regard to this item.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal hereby confirms the decision of the Program to deny the claim of the Applicants on the basis that they have suffered no warrantable financial loss.

ANITA BOURDEAU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
WILLIAM WATSON, Member

APPEARANCES:
ANITA BOURDEAU, appearing on her own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 15 October 1991 Ottawa

REASONS FOR DECISION AND ORDER

On November 8, 1989, Anita Bourdeau ("Bourdeau") and Reverend Father Laurent Frappier agreed to purchase from Sage Development Corporation for \$240,000 a new home to be constructed at 1630 St. Barbara Street, Gloucester. Father Frappier suffered a brain haemorrhage in 1986 and was confined to a wheelchair. The house was planned with open areas, wide hallways, pocket sliding doors and hardwood floors for better traction. There was to be an outside ramp and the basement stairs had a landing midway. The foundation was put in during December. Father Frappier suffered a second stroke on January 5, 1990 and died eight days later. Bourdeau had sold her home conditionally and had funds on deposit to pay the balance on closing.

Bourdeau stated that she had confidence in the builder since the corporation was registered in the New Home Warranty Program. She is on a part pension from teaching and decided to carry on with the completion of the new home. She said that she had a friend help in asking some questions while construction was underway, but that the builder became uncooperative so she lost confidence in the builder.

On the death of Father Frappier, she discussed the adjustment of several items which would not really be needed. The ramp was not put in, the basement stair landing was omitted and one

bedroom had a normal door installed. She said that no financial credit was given by the builder for these costs savings.

Possession was taken on April 30, 1990; and the Certificate of Completion and Possession notes that a tub in the ensuite bath required repair, while landscaping and paving of the driveway were not done.

On November 9, 1990, she sent into the New Home Warranty Program a letter with some 57 complaints. Some were attended to after a meeting on November 15; and the builder refused to do many items which he considered to be not warranted.

A conciliation was requested and three inspections took place on February 6, March 14 and June 27, 1991.

In preparation for this hearing, Mrs. Bourdeau prepared a list of 50 complaints. She gave evidence on each one. The New Home Warranty Plan called upon four witnesses who made comments on each item. These were:

Perry Harkins ("Harkins") has been a conciliator with the New Home Warranty Program for two and one-half years, and for five earlier years was a drafting and design consultant and a member of the City of Ottawa Building Department. He did the conciliation inspections and did, however, not see earlier Mrs. Bourdeau's list of 50 items tabled with the Tribunal on the day of hearing.

Phil Mayhew ("Mayhew") is the Assistant Manager of the Ottawa Regional Office of the New Home Warranty Program. He has been an employee of the Program for thirteen and one-half years, and was in construction for nine earlier years. His attendance on March 14, 1991 was to give a second opinion of the various issues raised.

Ron Dupuis ("Dupuis") is a sales representative for Canac Kitchens Limited; with five years' experience. He stated that the red oak box and hinges are standard and that the three styles offered are only different in the quality of doors. "Regal" are plain; "Ultra" have an oak veneer raised panel and "Ultra Plus" have a solid central panel. All the gable ends are of a "foil skin" cover.

Sebastian Valente ("Valente") is the President of Sage Development Corporation. He is a neighbour of Mrs. Bourdeau. After reviewing a brochure from another builder

for a bungalow, he arranged for this house to be designed for Father Frappier's needs on this lot which they chose. No credits were given for items not put in to the house, since these items were balanced by extras in his opinion; such as putting in a threshold for the front door. He attended on the conciliation inspection of February 6, 1991.

The Tribunal will list each of the complaints, the evidence received and our conclusions.

1. "Cupboards are not what I have chosen, or is in the contract, or on the blue print - 3 kinds of wood instead of two, one is of very cheap value".

Mrs. Bourdeau said that she wanted as many cupboards as in her former house and of the same quality, and that Valente had visited and seen her kitchen there. She said further that the builder Valente delayed her from visiting any showroom to make a choice of style and type. To her, these cupboards look like a combination of various types of wood put together. She said that her extra \$1,000 was paid with the expectation of solid oak throughout. Harkins noted that this item is referred to on the conciliation of February 6, 1991 on Schedule "A(2)" as Item 1 as follows:

Complaint: HALF THE KITCHEN CUPBOARDS ARE IN OAK, THE OTHER HALF IN AN ARTIFICIAL MATERIAL

Observation: All the cupboard doors are solid oak material. The gables and back panels are particle board core with white melamine on the inside and a simulated oak to match the doors, on the outside parts.

The homeowner's complaint is that she believes that those parts with the simulated oak finish should in fact be real oak veneer.

The specification, forming part of the Agreement, does not specify the materials to be used for the gables and back panels.

In cases such as these, where there is no specification, the accepted standard in the industry prevails. In this case, the accepted standard would be the matching simulated oak veneer.

Harkins sees no defect in the cupboards and referred to Schedule "B" of the Offer to Purchase, at Item 11.2 where the doors

are referred to as "prefinished oak veneer as per Vendor's samples." He said that the upgrade of the kitchen to Ultra Plus for \$1,000 extra brought solid oak doors. To Harkins, the cupboard doors are standard, normal and without defects. Dupuis explained the door situation as Harkins had set out in his evidence.

Valente said that he and Bourdeau went to his sales office and model home in Orleans and saw the Canac display board of various doors. As the solid oak doors were chosen, an upgrade to "Ultra Plus" was agreed and \$1,000 was paid. Valente said he did not refuse to have Bourdeau visit the Canac or any other showroom as she did not ask him. He finds the cupboard area equal or perhaps more than in Bourdeau's former home.

Counsel noted that this complaint was reported in the first year and rejected by the conciliator. The oak doors are sold and Bourdeau received what she paid for. There is no defect in workmanship or materials in her opinion. The Tribunal agrees and directs the New Home Warranty Program to disallow the claim.

2. "One lazy susan missing".

By this, Bourdeau said she meant that the lazy susan as installed is small, made of plastic and can only hold light items.

Harkins referred to the Conciliation Report of February 6, 1991 at item 5 on the "A(2)" Schedule.

Complaint: LAZY SUSAN DOOR NOT CLOSING WELL.

Observation: The homeowner refused to allow the builder to adjust the door because she would like the lazy susan replaced.

The lazy susan provided is a standard corner unit where the circular tray is as large as the width of the cabinet will allow.

The homeowner feels that the design and construction of the unit is unacceptable in that it does not allow her maximum storage capacity.

The Warranty is restricted to defects in material or workmanship. This standard unit is not defective in any other way than a door adjustment is needed.

The homeowner has stated that she would only accept the removal of the lazy susan unit and the placement

of shelving instead. The builder has refused to do more than adjust the door.

Unless the homeowner is willing to allow the builder to adjust the door, the Warranty Program cannot provide further assistance with respect to this one item.

He said that this is a standard unit and the enclosing of the inner wall space was normal to keep items from falling into the cupboard corners and base area. Dupuis said that the symbol for the lazy susan as it appears on the plans does not show actual circumference, as a size must be chosen to fit into the space as finished. He said that there is no defect in workmanship or materials here. Valente said that he would adjust the door and the Tribunal agrees that such an adjustment is to be made and orders the New Home Warranty Program to arrange to have that done.

3. "moulding missing".

Bourdeau said that this refers to a gap between the bases of the upper cupboard box frame which can be seen if one looks under the cupboards. Harkins said that a gap of more than an inch exists, and that usually no filler strip is put in place and he sees no defect in the workmanship or materials. The Tribunal finds that this claim should be allowed and directs the New Home Warranty Program to install a filler strip as required.

4. "Doors missing in pantry". Bourdeau said this really meant that she wanted some small shelves on the inside of the pantry cupboard doors with the shelves cut in for these. This was not done by Valente and she paid a workman to put some racks on the inside of the doors.

Harkins noted Item 18 on Schedule "A(2)" of the Conciliation Report of February 6, 1991 as follows:

Complaint: DRAWERS IN PANTRY.

Observation: The homeowner contends that the pantry is unacceptable in that it does not allow practical and full use of the entire two foot depth of the unit, hence she feels she should have drawers. The unit provided is a standard unit with large adjustable shelves. It was explained to the homeowner that there are several different options available for

pantry construction i.e.: sliding baskets, drawers, shelves or pockets.

There is no specification for any option in the Agreement and so the homeowner was given the most common standard.

Without detailed specifications, builders provide the most common unit. This has been done and meets the requirements of the Agreement of Purchase and Sale.

Bourdeau confirmed that her complaint also referred to drawers and Valente said that the pantry depth was changed so that shelves would be 2' deep rather than 1'. Counsel noted that there was nothing in the Agreement of Purchase and Sale about this and that there is no defect in workmanship and materials. The Tribunal agrees and directs the New Home Warranty Program to disallow this claim.

5. "Deep knots in the doors (Sage charged me an extra \$1,000 for solid oak".

Bourdeau says that the several knots are deep and large and show the use of low-grade materials.

Harkins referred to item 31 on Schedule "A(2)" of the inspection of February 6, 1991 as follows:

Complaint: TWO KITCHEN CABINET DOORS AND ONE DRAWER FRONT

Observation: Several oak doors have small knots, but the homeowner objects to two doors each with one small tight knot. Additionally, she objects to the darker grain of one of the oak drawer fronts.

The agreement specifies oak cabinet doors, but there is no specification for knot free or matching grain finishes.

The oak used for the door and drawer fronts is a standard oak with natural and normal variations in appearance.

He said that the largest knot was 1/4" to 3/8" in diameter and that this was expected and normal in a natural product. Any shading variations are also normal and he sees no defect here in either workmanship or materials. The Tribunal agrees and directs the New Home Warranty Program to disallow this claim.

6. "Holes in the floor under the sink".

Bourdeau states that the drain and water line holes in the deck under the sink are not carefully enclosed.

Harkins referred to item 24 on Schedule "A(2)" of the inspection of February 6, 1991 as follows:

Complaint: SUPPLY AND WASTE PIPE HOLES IN KITCHEN CABINET SHOULD BE SEALED

Observation: The workmanship in the installation of the pipes through the cabinet base are acceptable. The holes are the minimum needed to allow proper installation.

There is no requirement or specifications for these holes to be sealed. In fact any caulking or compound would fall away with the normal expansion, contraction and movement of the pipes.

Harkins stated that the cut outs are neat and reasonable. The Tribunal directs the New Home Warranty Program to disallow this claim.

7. "varnish missing on one door in main bathroom".

Harkins referred to item 27 on Schedule "A(2)" of the inspection of February 6, 1991 as follows:

Complaint: ENSUITE VANITY DOOR FINISH DULL

Observation: There is a noticeable area in the middle of the oak cabinet door where the finish is dull or washed out in appearance and feel. This type of damage could have been caused by a strong or abrasive cleaner. There is no documentation prior to possession which would positively attribute this damage to the builder.

Since there is no proof as to when this may have happened, the Tribunal must direct the New Home Warranty Program to disallow this claim.

8. "shelves and baskets are missing in pantry."

Bourdeau agreed that this was discussed under her complaint number 4. Since none of these items were expected under the Agreement of Purchase and Sale, the Tribunal directs the New Home Warranty Program to disallow this claim.

9. "front door hit the wardrobe when its opened".

Bourdeau said that the front hall closet has two double-pair folding doors. Harkins noted item 26 on Schedule "A(2)" of the inspection of February 6, 1991 as follows:

Complaint: CLOSET DOORS INTERFERE WITH THE FRONT DOOR

Observation: The design of the home provided by the homeowner was adapted for wheelchair access. One of the changes was to install an oversized 42" front entry door in a standard hallway. As a result, the door when opened could hit the opened bifold closet door side. With respect to section 13(2)(a) of the Act, any design or alteration provided by the owner is exempt from the warranty.

Harkins said that there is no defect in workmanship or materials here. The Tribunal agrees and directs the New Home Warranty Program to disallow this claim.

10. "the entrance door for closet is too large for the opening. It was adjusted once but still hard to open".

Bourdeau said that these doors were adjusted once, but remain difficult to operate. The Tribunal agrees that a further adjustment is required and directs the New Home Warranty Program to attend to adjust the hall closet doors.

11. "The sliding door of main entrance still scratching".

Bourdeau noted that rubbing of these pocket doors is marring the paint and while one was adjusted, the problem has

recurred. Harkins said that he would reinspect this matter once and repair as needed. The Tribunal, therefore, directs the New Home Warranty Program to attend once to reinspect and adjust the two doors, and to touch-up any paint as may be required.

12. "Garage door has many major problems".

Bourdeau believes that the door is too tight for its frame. She sees the door as shaking and wants a new door installed. Harkins noted that the door appeared to work well on February 6, 1991 and he saw no warranted repair to be needed. However, Mayhew's report of the reinspection of March 14, 1991 stated:

5. Overhead garage door.

Some minor damage was sustained prior to the replacement of the door's guiding bar. Painting of the damaged area is required.

13. Daylight visible at the overhead door.

A large gap (about 1/4") is visible between the upper and second panel, right side of the overhead door. Repairs are required.

Valente agrees that a gap exists and will replace the panel. A new door is not needed, in his view. Since this is a large heavy wooden door, some strain and noise is normal in its operation, he said.

The Tribunal concludes that the work as set out in items 5 and 13 appear to be completed and directs the New Home Warranty Program to allow this claim for repainting and the replacement of a panel to close the gap.

13. "Doors are too short".

Bourdeau said that the light and sometimes odours can pass under the 1" gap of the bedroom, main bedroom and second bedroom doors. Harkins said that these doors were cut for carpet clearance and that 1" is normal to ensure air circulation. He referred to the Conciliation Report Schedule "A(2)" at item 22 which states:

Complaint: FIVE DOORS CUT TOO SHORT

Observation: There is a gap of varying size, up to 1 1/4" at the bottom of the doors in the home.

The homeowner wants the doors as low as possible to the floor to prevent air flow from the bath rooms and to prevent light shining under the doors.

The installation of the doors is in accordance with good engineering practice as outlined in Part 6 of the Ontario Building Code. Namely that gaps form a part of the needed air movement in the home. The air movement is one of the parts necessary for even heat distribution.

Counsel noted that there is no defect in workmanship or materials here and that the gap is within normal tolerance standards. Harkins said that there is no defect in workmanship or materials here. The Tribunal agrees and directs the New Home Warranty Program to disallow this claim.

14. "one light missing in basement".

Bourdeau states that an area of the basement is not lighted. Harkins referred to item 8 on Schedule "A(2)" of the inspection of February 6, 1991 which stated:

Complaint: LIGHT MISSING IN BASEMENT

Observation: There are seven lights in the unfinished basement, which complies with the minimum requirements of Section 9.35 of the Ontario Building Code.

Harkins stated that the light fixtures are evenly spaced in the ceiling and that the Ontario Building Code requirements are met. Valente stated that Bourdeau took the house plans and marked her wishes, and that the electrician followed her directions so that all switches and plugs are where they should be.

The Tribunal accepts the evidence that the seven light fixtures are sufficient for the basement, and directs the New Home Warranty Program to disallow this claim.

15. "Switches of main entrance and in one bedroom are misplaced".

Bourdeau states that the first switch inside the front door operates the interior entry light and the second operates the outside light. She prefers that the switch closest to the door operate the outside. Harkins did not recall this complaint which was not made in the first year of occupancy. There is no Ontario Building Code reference to this matter and this is an item of personal preference, he said, and he sees no defect in workmanship or material here. Harkins said that the bedroom switch issue is referred to as item 9 on Schedule "A(2)" of the Conciliation Report of February 6, 1991 as follows:

Complaint: PLUG MISSING IN THIRD BEDROOM NEAR BED

Observation: There is one switched receptacle in the room.

The homeowner, working with the builders electrician, selected the locations of the receptacles. There is no signed documentation or specification as to the location of receptacles, and so it is not possible to positively attribute any defect against the builder or his forces.

He stated that again this is a matter of personal preference, there was no complaint made within the first year of occupancy and there is no defect in workmanship or material and that further, nothing appears on the house plans about this. The Tribunal can find no warranted matter here and directs the New Home Warranty Program to disallow the claim.

17. "One light missing in wardrobe".

Bourdeau explained that this meant a light was not in place at one closet door. Harkins referred to item 12 on Schedule "A(2)" of the Conciliation Report of February 6, 1991 as follows:

Complaint: LIGHTS MISSING IN CLOSETS

Observation: The homeowner complains that in some rooms, there is inadequate lighting for the closets.

The homeowner selected the lights and their locations working with the builders electrician. There is no specification or requirement for fixtures to be placed in or near closets.

He said that there are no defects in material and workmanship and no Ontario Building Code requirement for light

placement. Since there is no reference to this matter on the house plans and no warranted item, the Tribunal directs the New Home Warranty Program to disallow this claim.

18. "having removed the platform in stairway no possibility to change the light".

Bourdeau said that the platform landing midway down the basement stairs was taken out at the time after the death of Father Frappier. By shortening the stair run, Valente had told her that she would have more usable basement space. Now she cannot easily reach the ceiling fixture to change the light bulb if it becomes burnt out. She would prefer a wall mounted fixture. Harkins noted that the references in the Conciliation Report to this complaint are at Schedule "A(2)" at items 10 and 16:

10.

Complaint: LIGHT NOT PLACED WELL IN THE STAIRWAY

Observation: The hanging fixture is placed about mid stair rise. The homeowner's complaint rests with the difficulty in changing bulbs due to its lofty location.

The homeowner stated that she chose the fixture and the location. Additionally, there is no defect in material or workmanship with the fixture.

16.

Complaint: PLATFORM MISSING IN STAIRWAY

Observation: According to the homeowner and builder, an intermediate landing was to be built into the stairs to the basement. Subsequent to the death of Father Frappier, the co-purchaser, there was some discussion as to whether the landing was required or not. Part of the discussion centred around the location of the door at the basement level. It was agreed that if the landing were removed, the door would be placed as closely as possible to the stairs. The door in its present position is acceptable, had it been placed closer to the stairs, it would interfere with the supporting columns.

The spirit of the Agreement between both parties was carried out i.e.: to omit the intermediate landing and place the door as close as possible to the stairs.

Since Bourdeau agreed to the removal of the platform, the Tribunal can find no warranted claim about the light fixture. The Tribunal directs the New Home Warranty Program to disallow this claim.

19. "One plug missing down stairway".

With reference to item 23 on Schedule "A(2)", Harkins noted that no such plug is shown on the plan and that there is no defect here in workmanship or material. The Tribunal agrees and directs the New Home Warranty Program to disallow this claim.

20. "paving in front of the garage still has waves in it and keeps the water or the ice right in the entrance making the car slide in winter".

Harkins noted that this was not complained about in the first year of occupancy and there is, therefore, not any warranty. The Tribunal directs the New Home Warranty Program to disallow this claim.

21. "not enough topsoil on lawn which make it difficult to grow plants".

Again Harkins said no complaint was made about this in the first year of occupancy so that there can be no warranted claim here. The Tribunal agrees and directs the New Home Warranty Program to disallow the claim.

22. "also the soil does not cover the ciment (sic) around the house which house has not received the last coat of finishing material, and give the house very bad appearance".

Bourdeau said that the black tar water proofing can be seen above grade level. Harkins noted some normal subsidence of soil, but had rejected this claim in his letter following the June 27, 1991 inspection where he noted that this concern was raised after the first year of occupancy. As a result, the Tribunal must direct the New Home Warranty Program to disallow the claim.

23. "the lawn is bumpy". Harkins referred again to his inspection of June 27, 1991 which stated:

A2(17) of conciliation report of February

6, 1991 lawn bumpy: Your lawn as observed is acceptable with some minor subsidence of land over the lawn and near the foundation wall. Under section 13(2)(h) of the Act, subsidence of land is not covered under warranty.

Since there is no warrantable claim, the Tribunal must direct the New Home Warranty Program to disallow this claim.

24. "the tree is not what I have chosen, and is not a \$500 tree". Bourdeau said that she wanted a honey locust tree which have fewer and finer leaves so that there would be less to clean up in the fall of the year.

Harkins referred to the Conciliation Report of February 6, 1991 which noted at Schedule "A(2)", item 20:

Complaint: TREE UNACCEPTABLE

Observation: The homeowner claimed that she should have a much older and more beautiful tree on the front yard based on her belief of having paid \$500.00 for it.

According to Mr. Pitchers at the City of Gloucester as long as the builder has provided a tree as the Agreement specifies, then they have no other jurisdiction.

As there is no description of the size or age of the tree, and a tree has been provided as specified, the Warranty Program cannot warrant a complaint where value only is in question.

Valente said that \$500 was not charged Bourdeau who had originally asked for a red maple tree. He told her that such a tree as he had at his home was much more expensive and that he got it from his landscape supplier for \$500. He said that he did not agree to provide Bourdeau with such a tree. A honey locust was put in and the Director of Parks for Gloucester supervises the quality and method of planting which was done in November 1990. The tree was alive in the summer of 1991 and Valente said that if the tree died, he would replace it. On cross-examination, he said that the tree is planted in the fall of the year and that in this situation, her tree and a neighbour's were both put in at the same time when the other construction work had been completed.

Harkins noted that there was no complaint made in the

first year that the tree was dying and no evidence of any defects. The Tribunal requests that Bourdeau arrange an inspection of this tree by the Gloucester officials within 30 days of the issuance of this decision, and if the tree is dead or dying, directs the New Home Warranty Program to hold the builder to the requirement of replacing the tree as he has volunteered to do.

25. "2 feet are missing on the width of my lot".

The Tribunal has no authority to deal with such a claim and can only suggest that Bourdeau can consult with her lawyer and the City of Gloucester officials to review the survey of her lot. The Tribunal directs the New Home Warranty Program to disallow this claim.

26. "Fireplace - fans are (not) what I had ordered and also has charged me \$200.00 instead of \$75.00 on which we had agreed.

Bourdeau agreed that the word 'not' should be inserted as set out above. She said that the item of \$200.00 had appeared in the Statement of Adjustments, and she paid the money as she needed to obtain the house keys as the mover was arriving. She wanted these fans to operate as do those which heat her cottage.

Harkins noted his item on the aforesaid Schedule "A(2)" at number 3:

Complaint: TWO FANS MISSING IN FIREPLACE; FANS NOT POWERFUL ENOUGH

Observation: The fans have since been installed. The homeowner believes that the fans are undersized because she cannot feel the air or heat from the fan from her chair approximately eight to ten feet away.

The Prefabricated zero clearance fireplace, the same unit as was installed in the model home is not of the type to provide auxiliary heat to a home or room. Primarily, these units are for aesthetic appeal alone, and the small fans simply attempt to raise the efficiency levels of the unit minimally.

The fans operate as intended and do not indicate any defect in material or workmanship.

Valente agreed that the fireplace is the same as is in his model home.

Since there is no apparent defect in material or workmanship here, the Tribunal must direct the New Home Warranty Program to disallow the claim.

27. "downstairs underneath the fireplace, the floor gets wet in springtime".

Bourdeau said that dampness lasts for about three weeks in the spring time. Valente said that this was likely caused by a leak along the roof flashing around the chimney. He has had his roofing contractor attend to caulk and repair the flashing and was not told of any further problem.

Harkins said that this item was not complained of within the first year of occupancy and, therefore, was not inspected by him. Accordingly, the Tribunal directs the New Home Warranty Program to disallow the claim.

28. "Floor - full of waves all over the house to a point that the doors seem to have been cut in an oblique line".

Bourdeau presented no evidence on this matter beyond this statement and Harkins referred to item 22 on his Schedule "A(2)" which is set out for complaint "13" above. Harkins says that the doors are cut square, but the floor may have a very slight tolerable slope. In another house he said that the use of carpeting would mask any such appearance.

Valente said that 5/8" tongue in groove aspenite was used and not the 7/16" aspenite shown on the Agreement of Purchase and Sale. The Tribunal notes that a thickness of 5/8" is required by the Ontario Building Code and accepts the builder's evidence in the absence of anything contrary from the owner.

In the absence of any proven deficiencies, the Tribunal cannot accept this as a warranted item and directs the New Home Warranty Program to disallow the claim.

29. "the board underneath the cushion floor shows up and we feel under our feet the boards of the floor which are not of the same level, this will also cause damage to the cushion floor".

Bourdeau says that the joint lines can be seen and differences in levels felt by passing one's hand over the floor. Harkins noted that this was also included in Item 15 of Schedule A"(2)" as follows:

Complaint: WAVES IN KITCHEN FLOOR

Observation: The homeowner pointed out the location of underlay seams underneath the vinyl flooring. These are visible as light shines across, but are not seen from directly above, nor are they noticeable to the touch. The workmanship on the underlay and the subfloor below is according to the Ontario Building Code and not indicative of any defect in material or workmanship which could lead to premature wear.

He said that any gap between adjoining subfloor sheeting is filled with epoxy for a 1/8" expansion and contraction allowance. The cushion floor is, therefore, not effected in his opinion and he sees no defect in workmanship or material. The Tribunal can find no warranted defect here and directs to the New Home Warranty Program to disallow the claim.

30. "Heating: a full year of major problems with heat pump".

Bourdeau said that the heat pump was not working in May 1990, and she had to obtain a dehumidifier for the house. The installer had not been contacted as the builder had promised to do, but when wires on the equipment were changed around, and a piece replaced, she then had an operating machine by November 6, 1990. She notes that cool air is circulated for five minutes when the pump begins to operate.

Harkins referred the Tribunal to item 11 on the Schedule "A(2)" of his inspection report which notes:

Complaint: HEAT PUMP NOT WORKING PROPERLY

Observation: The complaints are with respect to cold air blowing out from the register at start up and the vibration caused by the unit. The cooler air lasting about five minutes is caused by the blower starting up early to recover as much heat from the exchanger as possible. This is indicative of an energy efficient unit and not a defect according to Mr. Fleck, the heating contractor.

With respect to the vibration and the noise associated, this is common and occurs when the unit is placed on brackets attached to the foundation wall. This is an acceptable method of installation and does not indicate a defect. Mr. Fleck agreed with these observations, but has offered to place

the unit on a stand on the ground to reduce the vibration and to extend the warranty to two years beginning February, 1991. Additionally, the builder has offered to pay the difference in heating costs caused by difficulties in the fall of 1990.

He noted that the fan first circulates air at room temperature which does feel cool. The Tribunal finds that there is no defect of workmanship or material here, and the Tribunal notes that a two year extended warranty has been given by the installer which the Tribunal directs the New Home Warranty Program to assist in having such warranty honored if called upon by Bourdeau.

31. "Dearie Contractors say the noise should not be greater in winter but it is noisier".

Bourdeau said that the vibration was much less after the repairs of May 1991, but she remained concerned about the noise. Harkins' observations are set out in the previous reference to complaint 11.

Harkins did not find any noise or vibration excessive, and said that hardwood floors in a house do cause an increase in noise levels. He sees no defect in workmanship or materials here and the Tribunal agrees and, therefore, directs the New Home Warranty Program to disallow the claim.

32. "Sage didn't refund me for the over charge of costing of heating as he said to me".

Harkins again referred to complaint 11 in Schedule "A(2)" as set out earlier, and Valente confirmed his offer to pay some part of the balance of heating costs in excess of normal costs as a matter of goodwill. As this is a matter between the owner and the builder, the Tribunal can make no ruling on this issue.

33. "nails are showing, coming out".

Bourdeau referred to various nail pops at the entrance between the kitchen and the dining room and in the ensuite washroom of the master bedroom. Harkins said that he had not been shown any of these on his inspection and no complaint was made in the first year of occupancy. Since there are no complaints recorded about this in the first year of occupancy, the Tribunal must direct the New Home Warranty Program to disallow the claim.

34. "Sage's men who came often in the basement have scratched the walls with ladders or other material".

Bourdeau believes that these scratches may have occurred as materials were moved in to replace various heating ducts or to attend to the heat pump repairs. Harkins noted his reference at item 30 of the Schedule "A(2)" as follows:

Complaint: SCRATCHES ON STAIR WALLS FROM BUILDER WORK AFTER POSSESSION

Observation: Builder denied scratches were as a result of his workers. There is no documentation prior to possession to prove conclusively that the few scratches of the paint finish are builder responsibility.

Harkins said that there were light scratches on the paint finish and not deep gouges. Valente did not know of this complaint and thought movers may have done these scratches while taking items into the basement. Since there is no clear proof as to the cause of the scratches, the Tribunal cannot accept this claim and directs the New Home Warranty Program to disallow the claim.

35. "kitchen's walls are not semi gloss latex as specified in the contract"

36. "large pieces of dust in paint"

37. "the kitchen ceiling is not latex satin paint but sprayed stipple finish (see contract) I suppose they did that to hide the defects.

Bourdeau spoke to the last item and said that she wanted a finish she could wash while now she would have to repaint each year.

Harkins said that none of these complaints were mentioned or pointed out on his inspections so they are all outside the first year and, therefore, not warranted. Since this is a cathedral ceiling, stipple finish is usual he said.

Since these items were not raised before the list was presented to the Tribunal today, the Tribunal must direct the New Home Warranty Program to disallow each claim.

38. "No vegetable spray in the kitchen."

Bourdeau wants a separate vegetable spray hose attachment for her sink. Harkins that this item was not claimed at the time of the inspection. Valente said that this was the first time he heard of this concern, and that he would install the hose. The Tribunal accordingly accepts the voluntary offer of the builder to attend to this item.

39. "We have asked a central vacuum, there's only 2 outlets of about 0.50 each."

Bourdeau noted that this appliance came with the house and was not an extra. Harkins said that again no complaint was made to him on his inspection and, therefore, this is not an item referred to in the first year of occupancy. In any case, there is no defect of workmanship or materials here, in his opinion. Valente noted that a system is roughed in by the builder and that the installer decides on the number of outlets needed so the hose can reach all corners of the house, which two outlets will do here.

Since this was not complained about within the first year of occupancy, the Tribunal directs the New Home Warranty Program to disallow the claim.

40. "WE HAD SPECIFIED CLEARLY to Sage that we wanted vinyl covered casement windows with dual glazing, we had mentioned to him that we never wanted to paint windows, never put tapes around the casement to paint them, (see contract) only the outside is in vinyl".

Bourdeau reviewed this item, and Harkins referred to his Schedule "A(2)" at item 2:

Complaint: ASKED FOR VINYL CASEMENT WINDOWS, ONLY THE OUTSIDE IS IN VINYL

Observation: Indeed, the casement windows are clad on the outside and painted wood on the inside.

The specification forming part of the Agreement under the heading for windows, specifies vinyl covered casement windows with dual glazing complete with screens where applicable. The construction industry interpretation of this sentence would be for an exterior only vinyl clad casement window and unfinished wood interior.

The words "solid vinyl", "maintenance free vinyl interiors" or "vinyl throughout" would have indicated that vinyl should be both interior and exterior.

He referred to Schedule B, item 9.1 in the Offer to Purchase which states:

9.1 vinyl covered casement windows with dual glazing c/w screens where applicable

He said that he had sold these windows for a year, and that Bourdeau received the normal product which was ordered. It is most unusual to provide solid vinyl windows, he said. There is no defect of workmanship or materials here and no breaches of warranty in his opinion.

Valente also stated that no vinyl covering on the inside of the windows would be normally expected from the words used in the Schedule. The desire not to paint was only for the outside of the house, not for the interior, he said.

The Tribunal finds no defect here in workmanship or materials directs the New Home Warranty Program to disallow this claim.

41. "also one front window has no vinyl at the top which is in different color with the other sides".

Bourdeau said that a filler board was painted rather than covered with vinyl so that the white colour is not a perfect match. Harkins agrees that a space has been filled with a piece of trim and finds the result sound and workmanlike. The shade of colour preference is not a defect, he said. Since no claim was made within the first year and there is no apparent defect here, the Tribunal must direct the New Home Warranty Program to disallow the claim.

42. "The basement windows are in bad condition, covered with black tar and smashed cement".

Bourdeau said there was splattered mortar which was not seen until after the snow melts in the spring. Harkins noted that this claim was not documented within the first year as stated in his letter after the inspection of June 27, 1990. The Tribunal

must, therefore, direct the New Home Warranty Program to disallow the claim.

43. "one glass of a window is broken".

Bourdeau says that this window is in the main floor family room. Harkins did not recall the item and said it was not pointed out to him on his conciliation inspection. Since the item was not complained within the first year of occupancy, he cannot warrant it. The Tribunal must direct the New Home Warranty Program to disallow the claim.

44. "crown moulding not completed in dining room and living room".

Bourdeau showed plans which have crown moulding defining the angle walls in this house on the living room and dining room interiors. There is no moulding on the facing wall to these rooms which defines a hallway area.

Harkins referred to complaint 14 on his Schedule "A(2)" and to item 17 on Mayhew's letter which was sent after the inspection of March 14, 1991. These items are as follows:

14.

Complaint: CROWN Moulding NOT COMPLETE IN LIVING ROOM AND DINING ROOM

Observation: The living and dining rooms are open to a large main hallway with the exception of angular walls designed to designate the individual spaces, between the rooms and the hallway. This is where the crown mouldings stop.

The homeowner feels the moulding should continue around to the hallway wall.

There is no documentation or specification as to the type, style, and location of moulding. The work as observed does not constitute a defect in material or workmanship or incomplete work.

17. Crown moulding not complete

I have discussed this issue further with my colleagues and it has been concluded that the area

in which you feel the moulding should be installed, is considered a hallway, and does not form part of the living room or dining room. Mr. Harkins's decision is appropriate.

Harkins sees no defect in any workmanship or materials and Mayhew agreed. Valente stated the model had crown moulding in the clearly defined usual room walls in both living room and dining room; but Bourdeau's house is an "open concept" style.

Since there is no apparent defect here, the Tribunal must order the New Home Warranty Program to disallow this claim.

45. "water in the bath doesn't evacuate completely, water stays in the bottom".

46. "moulding missing around the door of the shower in 2nd bathroom".

Bourdeau explained these claims and Harkins noted that no claim was made at the time of his first conciliation inspection or earlier. Since the first year of occupancy is over, there are not warrantable items here, in his opinion. As the claims were not made within the first year of occupancy, the Tribunal must direct the New Home Warranty Program to disallow these claims.

47. "no low gloss urethane on the wooden floors".

Bourdeau says that a high gloss finish was used which she did not want. Harkins referred to item 3 of Schedule "A(1)" of his conciliation report as follows:

Complaint: URETHANE STREAKED AND SHOULD BE LOW GLOSS

Observation: There is no requirement or specification for the finished urethane to be low gloss. Therefore, the medium gloss is acceptable and not warranted. There is an area along the south wall of the dining room where the finish is uneven, and is warranted.

This issue appears again on item 19 of Mayhew's letter:

19. Urethane streaked

Mr. Harkins originally required your builder to refinish the area along the south wall of the dining room. We have now also agreed that the

floor adjacent the basement stairwell requires refinishing.

Harkins noted that Bourdeau had signed off this issue as being completed as item 13 on the list of May 15, 1991.

As this claim was made within the first year and the Tribunal is not convinced that the problem has been fully attended to, the Tribunal directs the New Home Warranty Program to reattend and ensure that the medium gloss finish is evenly applied as required to complete the job.

"fan in fireplace is not giving heat to the house".

This was agreed by Bourdeau as having been included in the discussion on complaint 26.

48. "adjustment of doors to start again, the door is too large for the frame."

Bourdeau repeated her concerns about the garage door generally as earlier discussed in complaint 12. However, she further added that the interior door from the garage does not fit tightly and lets in cold air. Harkins inspected this and Mayhew noted in his letter after the joint inspection on March 14, 1991 at item 6:

6. Laundry room door needs repair.

The drywall at the upper left side of the door is separated. Appropriate repairs are required.

This is a steel insulated door with a positive seal and a door sweep, but no complaint about it was made within the first year, said Harkins.

The Tribunal must, therefore, direct the New Home Warranty Program to disallow this claim.

49. "cushion floor comes up over the moulding of the door (2nd bathroom)".

Bourdeau believes that the floor was cut to fit the moulding when it should have been the reverse. Harkins said that this claim was not documented in the first year or pointed out in his conciliation inspection. As a result, the Tribunal must

direct the New Home Warranty Program to disallow this claim.

50. "corking missing around tiles, has to be put again".

Bourdeau agreed that she meant to use the word "caulking". Again, Harkins said that no complaint was made about this within the first year of occupancy, and that he cannot warrant this item, following the comment made in his letter of July 10, 1991, after the inspection of June 27. Again the Tribunal must, therefore, direct the New Home Warranty Program to disallow this claim.

From the evidence heard and from a review of the Certificate of Completion and Possession and of the reports from the three conciliation inspections, the Tribunal has concluded that 18 items of Bourdeau's list were not recorded within the first year of occupancy and, therefore, cannot be allowed. These are items, 20, 21, 22, 23, 27, 33, 35, 36, 37, 39, 41, 42, 43, 45, 46, 48, 49 and 50.

There are two items which are beyond the powers of the Tribunal to resolve, namely items 25 and 32. The builder has voluntarily agreed to attend to item 38 and we commend him for that.

The Tribunal has refused to allow the claims made in items 1, 4, 5, 6, 7, 8, 9, 13, 14, 15, 16, 17, 18, 19, 26, 28, 29, 31, 34, 40 and 44.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to allow the claims in whole or in part as set out above with respect to items 2, 3, 10, 11, 12, 24, 30 and 47; and to disallow all other claims.

R.K. BRIMACOMBE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN CORSI, Member

APPEARANCES:
R.K. BRIMACOMBE, appearing on his own behalf
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 18 October 1991 Ottawa

REASONS FOR DECISION AND ORDER

Robert and Lyn Brimacombe purchased their two-storey home at 75 John Aselford Drive in Kanata from Aselford-Martin Inc., and took possession on May 6, 1988. This was the "model home" for the builder in this area and was built in 1986.

Mr. Brimacombe set out his claim in the "Summary of Reasons for Requesting a Hearing" where he wrote:

I submit that my house has a defect in workmanship that materially and adversely affects the use of the building for the purpose it was intended and thus I am requesting a hearing before the tribunal.

The defect is that the heating ducts, which are imbedded in the concrete slab floor, fill to a depth of about 4 inches with water each spring and fall, and the water remains for most of the heating season.

Specifically, my reasons for requesting the hearing are:

1. The water in the ducts is causing excessive damage to the house in the following ways:

- The ductwork is rusting out. In the not too distant future, it will rust through exposing the sand and fill under the house. It is not repairable, other than installing a non-central heating source.

- There is a chronic moisture problem in the house. The humidity is excessively high and uncontrollable because warm air from the furnace flows through the water-filled ductwork. Moisture condenses on the windows inside the house, forms puddles on the window sills, and then runs down the walls causing the paint to peel. It is necessary to mop up the water twice daily to prevent it from running down the walls. Mildew growth is also excessive, and the window frames and walls are becoming permanently damaged.

2. The excessive water in the heating ducts threatens the air quality in the house and poses a health risk. The stagnant water in the ducts provides an ideal breeding ground for bacteria and fungi. I will present scientific literature to support this claim. I am not comfortable with the fact that my wife, 18-month old baby and myself are continuously exposed to this hazard.

3. During the first 2 years of occupancy of the house I complained to the builder frequently about the problem. His representative assured me that it would be remedied, and indeed some steps were taken. However, the builder has now abandoned me and left it up to me to solve the problem. Thus, I have requested the hearing before the tribunal. My hope is that the new home warranty program will pay for the necessary repairs.

On December 4, 1989, Mr. Brimacombe sent a list of various problems and defects in his home to the builder and he referred to the situation of the water in the heating ducts. He did not send a copy of that letter to the New Home Warranty Program and first contacted the Program by letter on March 19, 1991 when

he referred to a telephone conversation which he had had with Mr. Paul Picard in December 1990. Mr. Brimacombe stated that in his opinion, a perimeter drainage system should be installed to clear the ducts from any water.

On cross-examination, Mr. Brimacombe agreed:

a) that he had received the Certificate of Completion and Possession and had completed and signed that document on May 2, 1988 and that his wife Lyn had also signed the document. Counsel for the Program pointed out the paragraph printed below the signatures which says:

The Builder/Vendor warrants that the home is constructed in a workmanlike manner and free of defects in material for one year from date of possession. A COMPLAINT MUST BE REPORTED TO BOTH THE VENDOR AND THE WARRANTY PROGRAM IN WRITING WITHIN THE FIRST YEAR OF OCCUPANCY.

b) that he had received the Warranty Certificate for his home, which had earlier been misaddressed to "General Delivery", in late January 1989 which was at least three months before the anniversary of possession. The following appears on the Certificate:

A The Vendor warrants to the owner:

(a) that the home (i) is constructed in a workmanlike manner, and is free from defects in material, (ii) is fit for habitation, and (iii) is constructed in accordance with the Ontario Building Code.

(b) that the home is free from major structural defects.

B The Vendor warrants to the owner that the basement is free from water entry.

The foregoing warranties take effect from the date of possession specified above and expire in the case of A, one year after the date of possession, and in the case of B, two years after the date of possession.

C Where, pursuant to section 14 of the Act,

(a) the Owner has a cause of action against the Vendor for damages resulting from a breach of any of the foregoing warranties and the claim is made to the Corporation, by written notice within one year after the date of possession (two years after the date of possession in the case of basement water entry);

(b) that the Owner suffers damage because of a major structural defect and the claim is made by written notice to the Corporation after expiration of the foregoing warranties and by the fifth anniversary of the date of possession.

The Owner is entitled to be paid out of the guarantee fund for all such damages, the amount required to rectify any breach of warranty or major structural defect to a maximum aggregate limit of \$50,000.

The Builder/Vendor warrants that the home is constructed in a workmanlike manner and free of defects in material for one year from date of possession. A COMPLAINT MUST BE REPORTED TO BOTH THE VENDOR AND THE WARRANTY PROGRAM IN WRITING WITHIN THE FIRST YEAR OF OCCUPANCY.

c) that he first contacted the New Home Warranty Program by his letter of March 19, 1991.

Mr. Charles Truelove was called as a witness for the owners. He is the superintendent of construction for the builder and confirmed that a drain was installed which has apparently helped to take away some water and that the offer of a "puddle pump" to be attached to a garden hose was rejected by Mr. Brimacombe.

On cross-examination, Mr. Truelove said that the heating ducts for such a house are laid out on a sand base and encased in concrete. After this, sand is compacted inside the 8" poured foundation wall and the cement floor is poured over a metal mesh so that the ducts are below the finished floor slab. He said that no evidence of a problem was apparent during the two years of use

as a model home when the winter temperature was kept at about 65°F.

Paul Picard is a senior conciliator in the Ottawa office of the Ontario New Home Warranty Program and reported on his visits to the Brimacombe home on April 5 and 10, 1991.

He said that on both visits, he saw some 5" of water in the warm air plenum below the furnace. He used a wet-vac to remove 30 gallons of water and noted in his decision letter that:

This plenum is approximately 20" in diameter, and its bottom is 24" below the floor level. It is also noted that 2" or 3" of water was present in several, if not all of the warm air supply outlets of the 1st floor. These were 18" below the floor slab.

Picard said that he considered that the installation of a sump pump with automatic float control would not be enough to resolve the problem, and that a perimeter drainage system would be best.

In his opinion, this is not a major structural defect since there has been no failure of the load bearing portion of the building, nor has the load bearing function been materially or adversely affected. Furthermore, there is no defect in workmanship or material that materially and adversely affects the use of the building for the purpose it was intended; that is, as a place of residence. He said that condensation and mildew had not been shown to him on his visits. He agreed that if this problem had been complained of within the first year of occupancy, the New Home Warranty Program would have had the builder repair and remedy the situation, probably with a perimeter drainage system.

Mr. Picard stated that this house has a 15kw electric forced air furnace with a wood furnace added as a cost saver. In his view, humidity therefore stays in the house and is recycled rather than being somewhat reduced as an oil or gas furnace would do through a chimney.

Brimacombe confirmed that the wood furnace is used for perhaps 90% of his heating needs and that there is a second 10kw electric furnace used just for an hour each morning to warm the air on the second floor of the house.

In conclusion, Mr. Brimacombe stated that the builder had been told of the problem and had tried over two years to resolve it.

Counsel for the Program reviewed for the Tribunal the definition of major structural defect as it appears in Ontario Regulation 726 as follows:

(o) "Major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

(i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

She noted that the complaint had not been made within a year of occupancy and that to succeed, Mr. Brimacombe had to prove that this was a major structural defect. She stated that there was no defect in workmanship and materials and no failure under subitem (i). Further, that even if the Tribunal should find some responsibility under subitem (ii), the following words would apply in two exclusions:

"excluding flood damage", and
"dampness not arising from failure of a load-bearing portion of the building".

Since there was no written notice of this problem in time, there is no warranty under a first-year claim. Since there is no proven health risk or danger in occupying this house, there is no application of the definition of major structural defect, in her opinion.

She also noted that warranties given under Section 13 of the Act are subject to various exclusions, and she referred particularly to Section 13(2)(e) which states:

- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

In her opinion, Mr. Brimacombe has not proved that there is a defect in the house, that any defect is structural, or that any structural defect is major.

The Tribunal has concluded with some regret that the definitions as set out in the Act and Regulation bar any recovery by the appellants. We agree that this is not a major structural defect as defined due to the exclusions in the definition and that the further exclusion as to dampness or condensation would also prevent the application of a warranty after a year of occupancy.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the claim made in this appeal.

CABOTO CONSTRUCTION

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE APPLICATION FOR REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
LUCIENNE BUSHNELL, Member
KEN WILLIAMSON, Member

APPEARANCES:

P. IANNETTA, representing the Applicant

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 17 June 1991

Windsor

REASONS FOR DECISION AND ORDER

The appellant was granted registration on March 27, 1986, under the Ontario New Home Warranty Program, but as a result of a Proposal of the Registrar dated December 9, 1988, its registration was revoked effective March 22, 1989. Caboto had not requested a hearing pursuant to Section 9 of the Act.

Subsequently, on June 12, 1989, an application was submitted for re-registration of the same company and since the Registrar proposed to refuse this application, the appellant has now appealed to this Tribunal to reverse the decision of the Registrar.

By an amended Agreed Statement of Facts (Exhibit 4), the parties have greatly assisted and abbreviated the work of this Tribunal, and must be commended for that co-operation. What might have taken two days of evidence has been reduced to a determination of whether or not there is sufficient evidence in that statement to permit this Tribunal to decide the issue.

The Statement of Facts sets out the background of the appellant's operations as follows:

FACTS RELATING TO THE PRINCIPALS OF THE APPLICANT:

1. Umberto Quaggiotto and Giovanni Quaggiotto are and were at all material times the officers and directors of the Applicant, Caboto Construction Limited ("Caboto"). Umberto Quaggiotto was also at all material times, an officer and director of Quaggiotto & Sons Limited ("Q & S Ltd."), which was at one time registered as a vendor/builder. Giovanni Quaggiotto was also, at all material times, the sole officer and director of John Q. Custom Homes Limited ("John Q. Ltd."), which was at one time registered as a vendor/builder.

FACTS RELATING TO REGISTRATION OF Q & S LTD:

2. Q & S Ltd. was granted registration on April 22, 1983. By Notice of Proposal dated January 14, 1986, the Warranty Program proposed to refuse to renew the registration Q & S Ltd. Q & S Ltd. did not request a hearing under s. 9 of the Act. The Warranty Program therefore carried out its Proposal, effective February 11, 1986.

3. Two of the homes built by and sold by Q & S Ltd. during the period of its registration were:

<u>Owner</u>	<u>Possession Date</u>	<u>Address</u>
Dickson	September 12, 1985	625 Dresden Place, St. Clair Beach
Illi	October 18, 1985	637 Dresden Place, St. Clair Beach

4. As a result of claims received after the revocation of the registration of Q & S Ltd., the Warranty Program paid \$2,050.00 in compensation to the Illis and arranged for repairs to the Dickson residence at a cost of \$1,700.00. The Warranty Program subsequently invoiced Q & S Ltd. for \$2,357.00 and \$1,955.00 (including a 15% administrative fee) in respect of the Illi and Dickson residences. These invoices remain unpaid.

FACTS RELATING TO REGISTRATION OF JOHN Q. LTD.

5. John Q. Ltd. was granted registration on June 16, 1983. By Notice of Proposal dated June 11, 1987, the Warranty Program proposed to revoke the registration of John Q. Ltd. on the grounds, inter alia that it was in breach of warranty with respect to the Ciarvanio residence, 1261 Carriage Lane, Windsor, and that it had failed to indemnify the Warranty Program for the compensation paid. The amount at issue was \$2,350.60, (including the administration fee). John Q. Ltd. requested a hearing pursuant to s.9, but this Tribunal upheld the Warranty Program's proposal by decision and order dated January 13, 1988 (17 Summaries of Decisions 131). The registration of John Q. Ltd. was accordingly revoked.

FACTS RELATING TO THE REGISTRATION OF CABOTO

6. Caboto was granted registration on March 27, 1986.

7. By letters dated June 3, 1987 and September 17, 1987, respectively, the Warranty Program advised that it would not renew Caboto's registration unless it paid the invoices pertaining to the Illi, Dickson and Ciarvanio residences and submitted security in the amount of \$1,000.00 per proposed unit. Caboto failed to comply within the seven days stipulated in the September 17, 1987 letter. Consequently, on December 9, 1989, the Warranty Program issued a Notice of Proposal to refuse to renew Caboto's registration. Caboto did not request a hearing under s. 9. The Warranty Program therefore carried out its proposal effective March 22, 1989.

8. By letter dated June 12, 1989 and received June 20, 1989 Caboto submitted an application for "re-registration", together with a cheque for \$2,350.60 (being the amount of the invoice for the Ciarvanio claim).

9. On or about July 13, 1989, Caboto entered into an Agreement of Purchase and Sale with Douglas John McKay for 1904 Edgmore, Township of Sandwich West.

10. By Notice of Proposal dated July 27, 1989, the Warranty Program proposed to refuse Caboto's application for re-registration. Caboto requested the present hearing, pursuant to s.9.

11. On August 11, 1989, the Warranty Program received a claim for compensation for breach of warranty from Douglas John McKay in respect of 1904 Edgmore. On October 16, 1990, the Warranty Program conducted a conciliation inspection and issued a conciliation report which listed two warranted items. Caboto did not repair the warranted items. On or about March 6, 1991 the Warranty Program paid \$875.00 in compensation to Mr. McKay, and invoiced Caboto for \$1,076.69 (which included the administration fee). No payment for the invoice has been received by the Warranty Program.

12. On December 11, 1990, Caboto was convicted of an offence under s. 22(1)(b) of the Act, to wit, two counts of acting as a vendor without being registered, contrary to s.6 of the Act. The sales which were the subject of the charges and conviction were:

- (a) transfer dated June 1, 1989 of a dwelling known as 1924 Edgmore, Windsor;
and
- (b) transfer dated August 4, 1989 of a dwelling known as 1904 Edgmore, Windsor.

It is clear from the statement that the Directors of the appellant company were also directors of Q & S Ltd. and John Q. Ltd., both of which companies had been registered under the Act and each of which had been the subject of a proposal by the Registrar resulting in the revocation of their registrations. The appellant has also had its registration revoked.

The Registrar relies on Section 7(c)(ii) of the Ontario New Home Warranties Plan Act which provides:

- (c) the applicant is a corporation and,
.....
- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty.

Counsel for the Registrar points to the revocations of the three companies' registrations, two for refusal to reimburse the Program for claims involving homes built by them and the appellants for failure to comply with the Registrar's request for reimbursement and provide a security deposit.

It is true that the appellant had submitted a cheque to the Program for \$2,350.60 to compensate the Program for the default of John Q. Ltd., but apparently the company tendered it only on the condition of its registration and expected it to be returned in the event the registration was refused. It is also to be noted that this reimbursement was not made until a year after the initial demand by the Program.

Paragraph 12 of the Agreed Statement of Facts discloses the conviction of the appellant in two counts of acting as vendor without being registered. Arising from these transactions, there apparently is a claim for compensation against the company for \$1,076.69, \$875.00 of which was paid out by the Program to one McKay. Two claims by the Program against Q & S Ltd. in the sum of \$2,357.00 and \$1,955.00 remain outstanding. None of these claims have been honoured by the officers of the appellant company.

The Statement of Facts is an admission by the appellant of the truth of the information therein contained. There is, therefore, no necessity for this Tribunal to hear further evidence and it clearly would be an abuse of process to go into the background involving these company's revocations. There is without reservation clear evidence of the failure of the appellant company's officers to carry on their operations in accordance with law and with integrity and honesty. Under the circumstances, the Registrar's Proposal must be upheld.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to carry out his Proposal.

JOHN AND TERESA CAMPBELL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JOHN HURLBURT, Member

APPEARANCES:
JOHN AND TERESA CAMPBELL, appearing on their behalf
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 10 October 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants John Campbell and Teresa Campbell from a decision of the Ontario New Home Warranty Program issued in a decision letter dated June 4, 1990. The appeal was with regard to four items disallowed by the Warranty Program:

1. The rear door that freezes in the winter and leaks in the summer.
2. The stove fan not exhausted to the outside.
3. The shower stall (previously repaired) leaking again.
4. The bricks on the house chipping, cracking and crumbling.

The Applicants purchased their property at 57 Goldwin Street in Hamilton from the vendor/builder by an Agreement of Purchase and Sale dated May 21, 1985. The transaction was closed on August 30, 1985 and the Applicants took possession on that date. The one year term limited for making a claim under Section 13 of the Ontario New Home Warranties Plan Act commenced to run from that time.

Concerning the rear door, the evidence established that water leaks in around this door when it rains and larger amounts if wind drives the rain against the door. It will form a pool of water on the floor inside and in the winter, ice will build up around the door and in the corner inside. The only complaints made by the Applicants within the time limited were contained in a letter from them to the Program dated August 18, 1986 received by the Program on August 25, 1986. In the seventh item listed there, there is a reference to the back door and the complaint is in regard to the trim with no reference to any leaking of water. John Campbell said in his evidence that he thought the water was getting in through a crack in the concrete wall near the door, getting to the door frame and through into the house.

Mr. Andy Richters, Senior Conciliator with the Program, attended and made an inspection of this house. Teresa Campbell was there when he did and took him through the house and showed him the various defects with which she was concerned. He said he saw no evidence of any crack in the concrete wall and he came to the conclusion that whatever water was coming into the house was coming in around the door. Clearly if the deficiency in the construction is, in fact, a crack in the concrete wall, there is no complaint as to this within the time limited. Neither, however, does the Tribunal find that the complaint about the trim was notice of this leaking and freezing of water.

It was the submission of counsel for the Program that the proper test, in determining this question, is that there must be a causal connection between the complaint which is reported and the actual deficiency in question. The Tribunal agrees with this submission and cannot find such a causal connection between this complaint as to the trim and the leaking of water during rain storms. Therefore, this item cannot be warranted because it was not reported in time.

The second item concerns the stove fan not exhausted to the outside. Item "Y" on Schedule "A" attached to and forming part of the Agreement of Purchase and Sale calls for: "Kitchen to be equipped with hood and fan, exhausted to outside." The evidence established clearly that this was not exhausted to the outside, but only through a filter back inside. There appears to have been a clear breach of contract here on the part of the vendor/builder which would constitute a breach of warranty, but there was no report of this complaint to the Program in the letter of August 18, 1986 and, therefore, no report within the one year and this claim also fails upon this ground.

We come next to the complaint of the shower stall leaking. Here the situation is different because it was reported

within the year being the third item listed in the letter of complaint of August 18, 1986.

This shower stall is located in the basement and is constructed with five sides rather than four. The frame was of wooden scantlings covered on the inside with wall board over which is glued the tile finish. It also has a tile floor. All of this is set on top of a concrete slab base. During the first year, water from the shower leaked out of the shower stall around the bottom causing the wall board to rot, and causing mould and a bad smell and perhaps other damage. The Applicants complained as aforementioned and the Program hired a contractor, Boudreau Homes Limited to go in and remedy this defect. The contractor made repairs and on September 21, 1987, obtained a release from Mrs. Campbell acknowledging that it had completed the repairs as outlined in a Schedule attached and further that, for the value of the work done, namely \$765.00 as acknowledged, the available warranty coverage was reduced by that amount.

Thereafter, while unknown to the Applicants for a considerable period of time, water continued to leak at the bottom of the stall and finally the fact that there remained a problem became apparent by reason of a bad smell when dirty, stagnant water collected around the bottom of the partition of the shower stall. On April 16, 1990, the Applicants wrote to the Program covering the four complaints which are the subject of this appeal and dealt with this one in the following terms:

Another problem that your office did have rectified (our down stairs shower stall leaking) lasted approximately 1 1/2 years. We are now in the process of fixing this ourselves. In the process we found that
 1) there was no vapour barrier (removed)
 2) that a minimum of glue was used on the replacement tiles, and 3) one of the 5 sides was never fixed in the first place.

In order to find out what was wrong, Mr. Campbell had taken the tiles off around the bottom of the 5 sides of the stall up to a distance of some 20" or so and had discovered that the original repairs were made only to 4 sides leaving the 5th (the one with the step-in at the bottom of the door opening into the stall)

not repaired, and in the same defective condition as left by the builder at the beginning. It appeared that water continued to leak out at the bottom along this side and run around the bottom to the other sides making everything wet and eventually causing the smell. Then Mr. Campbell removed the tiles as aforementioned. He also found that the tiles which had been glued to the wall board by

Boudreau when completing its repairs were glued with small patches of glue rather than with glue covering the whole of the tile.

When Mr. Campbell uncovered the wall boards to see if he could determine what was wrong as aforementioned, he had intended to go on with repairs but he received some advice (from an unidentified source) that the situation should be left as it was until the Program could inspect the problem and then, the Program refused to do anything about it, until the outcome of this appeal has been heard.

Mr. Richters objected that Mr. Campbell had removed these tiles when he did before the Program had an opportunity to inspect, but the Tribunal does not think Mr. Campbell should be criticized for this because no one could see or tell what was wrong until this was done.

It is the Program's position that the present complaint is not a warrantable deficiency because it was not reported to the program until after a year following the repairs by Boudreau and that the provisions of Section 13(4) are, therefore, a bar to the Applicants' claim. While there is some discrepancy in the evidence between that of Mr. Campbell and of Mr. Richter's on these points, the Tribunal finds, on the balance of probabilities, that the current problem is the result of the 5th side not being repaired by Boudreau and continuing to leak, and also that the wall board used as backing from the tiles, both by the original builder and by Boudreau, was not "moisture resistant backing" as required by the Ontario Building Code. The question then becomes whether the current complaint of deficiencies is warrantable under all of these circumstances.

Upon the findings made above, the current deficiency (the leaking of water out at the bottom of one side of the shower stall), was constructed and left in its present state by the original builder and was included in the original complaint set out in the letter of August 18, 1986. The Program always was and still is responsible to the Applicant to remedy this. Furthermore, the very purpose of the section of the Ontario Building Code quoted above requiring moisture resistant backing behind these tiles was to prevent or alleviate the types of damage which occurred here. It is to be noted that this Sec.9.30.13.4 was not in effect in 1985 when the builder installed the ordinary wall board in the first place but it was in effect when Boudreau made his repairs in 1987, and he should have complied with it.

Lastly we come to the complaints about the brick chipping, cracking and crumbling. The evidence and particularly that of photographs filed showed some deficiencies in workmanship and perhaps also materials in the brickwork. These are clearly not

major structural defects within the meaning of Section 14(1)(c) of the Act and no complaint was made concerning them within the one year limited by Section 13(4) so that they cannot be included within the warranty for which the Program is responsible.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the Applicants' claim with regard to a shower stall and to disallow the other three claims herein.

CARLETON CONDOMINIUM CORPORATION NO. 279

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
WILLIAM WATSON, Member

APPEARANCES:

ROGER THIBEAULT, representing the Applicant

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 28 October 1991

Toronto

REASONS FOR DECISION AND ORDER

In this matter, the Applicant has appealed from the decision of the Ontario New Home Warranty Program denying his claim for \$11,040.00 for repairs and \$3,167.87 for plumbing repairs. There is an Agreed Statement of Facts which is filed as Exhibit 9 and in view of the Agreed Statement of Facts and the ... of Mr. Thibeault representing the Applicant, it appears to the Tribunal that the roofing was a claim which fell within the first year and was subsequently addressed when a settlement was reached and the Program paying some \$201,000 to the condominium corporation at that time in full settlement of all its first year claims. I am corrected to \$205,000. But in any event, the Release quite obviously covers all issues that have arisen during the first year as far as the submission of Mr. Thibeault with regard to the compulsion to sign the Release, we do not consider that would be sufficient evidence to rest in any form which would obviate or abrogate the provisions of the Release, result of which the Release was signed voluntarily and that being so, it is a full Release binding upon the signatories.

With regard to the plumbing, the plumbing was either part of the first year claim in which case it would have been covered by the Release and if it is not part of the first year claim as intended by Mr. Thibeault then we must find that in 1987 and 1988 when the plumbing problems arose that they were part of a major structural defect. Now in examining the definition of a major

structural defect, we find that the plumbing repair and deficiency, whatever it was, was caused to the pipes falls within the exclusion of the major structural defect section in Regulation 726 and would not be covered under any circumstances by the Warranty Program.

Under the circumstances then without the necessity of adducing or listening to any further evidence, this Tribunal by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act directs the New Home Warranty Program to disallow the claim.

CARLETON CONDOMINIUM #455

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
JAMES GRAY LESLIE, Vice-Chairman as Member
WILLIAM WATSON, Member

APPEARANCES:

LISELOTTE WESTLAND,
representing Carleton Condominium #455

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 8 November 1991

Ottawa

REASONS FOR DECISION AND ORDER

On February 8, 1990, Michel Imbeault, a property management administrator with Shelter Property Management Inc., wrote a letter to Eric Honey on behalf of Carleton Condominium Corporation #455 of 1099 Cadboro Road in Gloucester.

The letter outlined 12 deficiencies in the building and was sent to Mr. Honey's law office as he was apparently one of the principals of the company which built the project. There is a note at the end of the letter which states "c.c. HUDAC".

Counsel for the New Home Warranty Program said that the one year warranty period for common elements ended on February 20, 1990, and a copy of Mr. Imbeault's letter was received by fax from him at the Program's Ottawa office on March 30, 1990.

On April 4, 1990, Karen Meyer-Johnson, the Condominium Coordinator at the Ottawa office wrote to Mr. Imbeault to note that the builder's warranty for first year complaints had expired and that no complaints were received in that first year. Mr. Imbeault wrote again on April 9, 1990 as follows:

In response to your letter dated April 4,
1990, I feel this matter needs to be

resolved as soon as possible.

Your decision that the New Home Warranty Program cannot assist us, due to the fact that correspondence was not received at your offices prior to the deadline of one year following the date of registration, is not a just one.

Our letter to Eric Honey was couriered on February 13, 1990 and at that time, a copy was mailed to your offices. On approximately March 30, 1990, I followed up by telephone to make sure that our letter was received. From our conversation, it was discovered that, in fact, you had not received a copy, at which time I send a second copy by facsimile.

In closing, I feel that due to the circumstances of the mail not being, and the fact that we did have a claim and did forward it before the required date, that your department can consider our letter as being valid and hope that there is room in your mandate for this type of situation.

Your response to this matter would be greatly appreciated.

On April 23, 1990, John Reid, Manager for Eastern Ontario of the New Home Warranty Program wrote a formal decision letter to Mr. Imbeault which stated in part:

This claim is based on Shelter Management Property Incorporation's assertion that, a complaint letter was submitted to the Warranty Program, on behalf of Carleton Condominium Corporation 455, by ordinary mail within the first year warranty period.

Our records indicate the commencement date of the common element warranty of C.C.C. 455 was February 20, 1989. I do not believe there is any disagreement concerning this date. On or about March 30, 1990, Mr. Michel Imbeault of Shelter Management Property Inc., contacted this

office (to) inquire whether or not a complaint list had been received.

On being informed no complaint list was on file, Mr. Imbeault sent a facsimile copy to this office on March 30, 1990, which was duly date stamped as received. This complaint list, with the Shelter Management Property Inc. letterhead was dated February 8, 1990 and was addressed to Honey, MacMillan, Gilhooly and Baldwin, of Ottawa. It was signed by Mr. Imbeault, with the notation "c.c. HUDAC". Mr. Imbeault later indicated this letter had been couriered to the addressee on February 13, 1990. This office has to date received no correspondence through the mail concerning the above complaint list, which was allegedly copied to the Warranty Program in February. No address was included beside the acronym HUDAC, nor has this acronym been in use by the Warranty Program for more than eight (8) years.

In any case, the Ontario New Home Warranties Plan Act R.S.O. 1980, c. 350, sub-sec. 13(4) states: "A warranty under sub-sec. (1) applies only in respect of claims made thereunder within one year after the warranty takes affect, on such longer time under such conditions as are prescribed", (note: sub-sec.(1) of the Act describes the extent of warranty coverage).

The Warranty Program received the complaint list over five (5) weeks after the expiry of the one year warranty period. Under sub-sec. 13(4) of the Act, the first year warranty no longer applies. There is nothing in the complaint list referring to basement leakage (two years coverage) or major structural defects (five years coverage). This cannot, therefore, be considered as a valid claim.

In his letter of May 2, 1990, Mr. Imbeault appealed this decision to the Commercial Registration Appeal Tribunal. The usual information letter was sent by the Registrar of the Tribunal to Mr.

Mr. K.G. Gupta, of Shelter Property Management Inc. at his request, and the formal Notice of hearing of this appeal was also sent to and acknowledged by Mr. Gupta.

Ms. Liselotte Westland appeared on behalf of the Condominium Corporation. She said that Shelter Property Management Inc. "closed their doors" on October 31, 1991 and that she had taken over the management of this project. There is to be a new Board of Directors for the Condominium Corporation. The whereabouts of Mr. Imbeault and Mr. Gupta are not known to her. She said that she learned of this hearing on November 1, 1991 and has no records or correspondence. The files as may exist will be available to her on November 11, 1991 and she agreed that she would prefer to have an adjournment of this hearing although if nothing was found in the files to show delivery of the complaint list before February 20, 1991, then she would undertake to withdraw this appeal.

Counsel for the Program said that the letters which are available confirm that no list was delivered to the Program within the one year and that the Program's conciliators have never inspected the building. Therefore, if delivery of the list could be proved, the hearing could not proceed for at least several months until an inspection could be arranged and completed.

The Tribunal has considered the request made by Ms. Westland and concludes that while it is most unlikely that clear proof of delivery to the Program of the complaint list will be found, there should in fairness be an opportunity here to look for any possible evidence which would assist the appellant.

Therefore, in accordance with the powers of the Commercial Registration Appeal Tribunal as set out in Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal orders the New Home Warranty Program to disallow this appeal, unless within 60 days of the release of this decision, the Condominium Corporation is able to prove directly and to the satisfaction of the New Home Warranty Program and of the Tribunal that the letter of February 8, 1990 was received by the Program's Ottawa office on or before February 20, 1990. If such proof is forthcoming, then the usual conciliation procedures will take place.

DAVID CHALKER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
GORDON R. DRYDEN, Vice-Chairman as Member
STEPHEN PUSTIL, Member

APPEARANCES:

BIRUTE BOURNE, agent for the Applicant

STEPHEN P. AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 13 November 1991

Toronto

REASONS FOR DECISION AND ORDER

David Chalker and Kristina Obal purchased a new home in Pickering under an Agreement of sale dated February 4, 1988 from Village Green Homes. The original price was \$207,900 which included \$3,500 extra for Elevation B to be constructed on a cul de sac and \$3,500 for changing the garage to suit the lot. The Offer was subsequently amended from the B Elevation to Elevation A and the price reduced accordingly to \$205,900.

Prior to closing, Chalker complained to his lawyer that he was not getting the garage he expected since it had only one door instead of two. The lawyer took it up with the builder, but since there was no resolution of the matter the transaction closed on March 15, 1989 at which time Chalker took possession.

The appellant now comes to this Tribunal appealing the decision of the New Home Warranty Program which has disallowed his claim for \$3,500 he alleges he paid extra to the builder for the garage he had contemplated.

In his evidence, Chalker said he had chosen the cul de sac lot and because of its shape, he was obliged to pay an extra \$3,500 to have the garage revised. He admitted, however, in cross-examination that although the price had been reduced, in the amended agreement involving the elevations, he had received the

Elevation B which was in fact the more expensive of the two. He also admitted that prior to closing, he realized he was not getting what he thought he had contracted for but did not remember whether or not the builder offered to return his deposit and terminate the transaction. It is clear from his evidence that although the garage is not different from the revised plan in depth, it is not as wide and has only one door instead of two.

David Brand, a real estate broker for nineteen years who sold this home to Chalker said the purchasers were buying an oversized house on an undersized lot. Because of the configuration of the lot, a certain revision had to be made to the garage. He pointed out that Chalker had received Elevation B at the \$205,900 price.

Brand was the marketing representative and adviser to the builder and said that he offered to call the transaction off and give the purchasers their money back, but Chalker replied "Why should he give the house back and let the builder sell it for more?" In that connection, it is to be noted that Chalker's summary of the facts include the statement:

During closing there was some discussion with their lawyer regarding the garage and front door layout, but during that time the market was in an extremely excited state and the home closed with no holdback from their solicitor (which was not unusual during that period of time).

An examination of the Offer to Purchase reveals that in the Schedule "A" attached to it, no. 27 on the list refers to "Raised panel wood sectional garage doors, paint finish". The Offer, however, also contains the following provision:

- (f) The Vendor shall have the right to substitute materials for those designated in the plans and/or specifications provided the quality is equal or better, and also to make minor changes in plans, siting and specifications, provided there is no objection from the first mortgagee or the Municipality.

There is no evidence before us that the purchasers received less in value or quality than that for which they had contracted.

In disallowing the claim, the Program based its decision on the following reasons:

Claims, such as the changes to the construction of your unit, and the monetary implications of such unauthorized changes can only be addressed through the Warranty Program coverages for Breach of Contract (return of deposit money to a maximum of \$20,000 when the sale is not completed) and for Unauthorized substitutions. Since you completed the purchase transaction on this unit, only a claim for unauthorized substitution could be considered by the Warranty Program.

In the consideration of this claim, the builder has stated that the Agreement of Purchase and Sale was entered into on February 6, 1988. This date is prior to the effective date of substitution coverages which became effective for Purchase and Sale Agreements entered into after June 30, 1988. As this protection against substitutions cannot be applied retroactively, it is for this reason that the Warranty Program cannot assist you with your claim.

We are in agreement with the finding as far as it goes and it is supported by the provision in the contract (supra) permitting the builder certain latitude in changing the plans if the substitution is of equal value. We have been presented with no evidence that the change was of a lesser value or inferior quality.

It is argued, however, that section 14(1) or section 14(2) of the Act should apply to this claim.

Paragraph section 14(1) of the Act provides:

14.-(1) Where

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

We point out, however, that the section refers to a person who had entered into a contract and Mr. Chalker could no longer be brought under that section since the moment he closed the transaction, he became an owner.

This brings him under section 14(1)(b) if at all. Section 14(1)(b) provides:

- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

In order to view his claim favourably, the Tribunal must be presented with evidence of a breach of warranty falling within the provision of 13(1)(a) which provides:

13.-(1) Every vendor of a home warrants to the owner

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

There is no evidence before this Tribunal of defects in material or that the home was not constructed in a workmanlike manner. It is fit for habitation and constructed in accordance with the Ontario Building Code. There is finally no major structural defect upon the which appellants can rely.

The Tribunal for these reasons, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, must disallow the claim.

CHANTAL DEVELOPMENT INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
LUCIENNE BUSHNELL, Member
WILLIAM WATSON, Member

APPEARANCES:
WILLIAM G.D. MCCARTHY, representing the Applicant
BRIAN M. CAMPBELL, representing the Ontario New Home
Warranty Program

DATE OF
HEARING: 19 August 1991 Ottawa

REASONS FOR DECISION AND ORDER

The Tribunal, having received the Proposal of the Registrar under the New Home Warranties Plan Act, dated September 17, 1990, to refuse to renew the registration of Chantal Development Inc. and having received the uncontested evidence in support thereof, in accordance with the authority vested in the Tribunal under Section 9 of the Act, directs that the Proposal of the Registrar be carried out by the Registrar.

RAY CHIU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:
RAY CHIU, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 13 February 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Ray Chiu from the decision of the Ontario New Home Warranty Program dated the 13 day of June, 1990 disallowing his claim for further repairs on two basement windows alleged to be defective because they permit water to enter the basement.

Mr. Chiu purchased a home from the Iona Corporation and took possession on May 18, 1988. In a letter to the builder and the Program of July 15, 1988, he complained of water leaks in the basement as follows:

- (12) Serious water leak in basement
 - (a) north wall near west corner area
 - (b) west wall near south corner area
 - (c) east wall in 2 different areas
-

On August 22, 1988, he again wrote to the Program:

(6) Nobody in your construction office contact me to correct the basement leak, and the leak at north west corner is getting worse. The basement is full of water when it rains.

The builder replied that the relevant trades had been notified to effect the necessary repairs and an inspection was carried out on November 14, 1988.

It appears that all of the leaks of which Mr. Chiu complained were successfully addressed except two involving the windows which are the subject of this appeal.

On February 26, 1989, the appellant requested conciliation and was advised that an inspection would take place on April 26, 1989. Mr. Brian Martindale in his report dealt with the matter as follows:

Complaint - Water leak in basement wall.

Observation - The Homeowner(s) stated that last year water leaked through the east poured concrete basement wall under the south window; no leakage has been evident this year. No crack was visible at this area.

Comment - The Homeowner(s) is to water test in the Builder's presence. The Builder is to repair should said water test prove positive.

A Mr. Tony Allegranza, conciliator for the Program, testified that he attended the second conciliation on October 13, 1989 when the homeowner and the builder's representative were also present. A water test was conducted prior to which he had inspected the basement and found no water entering either the walls or the windows. When, however, water was heavily sprayed on the windows from a hose, he saw water entering from the base of the window into the basement. He advised the builder at that time to caulk around the windows and this was done. On May 17, 1990, the builder Iona Corporation wrote to the Program as follows:

May 17, 1990

Ontario New Home Warranty Program
1091 Gorham Street
Newmarket, Ontario
L3Y 7V1

Attention: Mr. Tony Allegranza

Dear Mr. Allegranza:

Ref: #10-3131-209932, Lot 61, 17 Major
Elliot Ct., Avalon

This letter is to confirm our telephone conversation of this date regarding the above-mentioned home.

The Iona Corporation has repaired the leaking basement window located at the north-west elevation. This window does not leak during any type of rainfall, it only leaks when the purchaser sprays the window under excessive force with the garden hose or if the window is saturated with an oscillating sprinkler. The purchaser admitted on two separate occasions that the only time the window leaks is when he waters his grass.

It is our conclusion that the purchaser's demands are unreasonable and therefore this file will remain closed.

Yours truly,

THE IONA CORPORATION

Mark Warsh
Inspector

Mr. Derek Finerty, a Manager with Iona Corporation, had attended at the premises after the repairs were done. He said all the caulking had been stripped and the windows re-caulked. He pointed out that the Company built 400 - 500 houses per year and used the same windows in each. They are metal framed windows approved throughout Ontario and designed to provide both ventilation and light to the basement. He testified that there is a 2" track running the length of the window, and each window is at a slight angle to provide drainage. Direct pressure, such as from a hose, will tend to make slide windows separate or the track will fill up and drain down inside. He could, however, find no fault with either the glass or the track.

Mr. Chiu, however, continued to complain and on May 21 again wrote to the Program:

In my basement, there are four basement windows, two of those windows are water leaking very (sic) time when I use a sprinkler to water my lawn, the builder tried to repair both windows, but not successful.

I reported to Mr. Allegeranza about this complaint, and Mr. Allegeranza said, water leak from both windows are not warranty item, because I use a gardening hose gun to do water test, and this is different with natral (sic) rain fall.

There have been ten letters of complaint from Mr. Chiu to the Warranty Program. There have been two conciliations and there have been numerous attempts on the part of the Program and the builder to resolve this issue. As far as the latter is concerned, the matter is at an end because there is no water penetrating into the basement under normal conditions.

The final position of the Program and the builder is set out in the following two letters:

June 13, 1990

Ref#: #10-3131-209932

Mr. Ray Chiu
17 Major Elliot Court
Unionville, ON
L3R 9C3

Dear Mr. Chiu:

Your concern over the basement windows has been referred to me. A re-inspection by Mr. Allegranza on October 13, 1989 failed to reveal any defects, however, the builder was asked to re-check the windows installation and caulk if necessary.

The builder has now informed me that those steps were taken and that they feel they satisfied this complaint.

Our opinion is that the water tests conducted by you with a hose or a sprinkler

are exaggerated, therefore, saturating the bottom track eventually spilling on the interior basement walls. You have indicated both verbally and in writing that these windows have never leaked under rainstorm conditions.

COMPLAINT

Two basement windows are leaking when sprayed with garden hose or a sprinkler.

DECISION

I feel that your complaint is not justified.

REASON

From your own admittance! "No water penetrations under rain conditions."

Yours truly,

THE IONA CORPORATION

Mark Warsh
Inspector

MW/kc
(K-35)

and

July 4, 1990

O.N.H.W.P.
1091 Gorham Street
Newmarket, Ontario
L3Y 7V1

Attention: Mr. Tony Allegranza

Dear Sir:

Ref: #10-3131-209932, Lot 61, 17 Major
Elliot Cres, Unionville, Ontario

Further to my letter of May 17, 1990 and your decision letter of June 13, 1990, I wish to confirm the following.

To appease the above purchaser we sent service staff to recaulk and inspect the alleged leaking windows on (2) separate occasions.

The above mentioned purchaser has admitted verbally and in writing that the windows in question never leaked during any type of rainfall. Only when the purchaser duplicates monsoon force conditions by spraying the windows directly with a garden hose spray gun do the windows leak at the bottom sill track area.

It is very obvious that the purchaser is simply filling the bottom track with excessive amounts of water which does not allow the weep holes to drain and the water, therefore, overflows the track and spills into the basement.

Should the above mentioned purchaser exercise normal common sense and only water his grass and not totally saturate the windows there would be no problem.

Since the purchaser can prevent the window from leaking by not watering his grass so close to the wall of the house and since we have already done everything we possibly can do to appease him, the file will remain closed.

Yours truly,

THE IONA CORPORATION

Mark Warsh
Inspector

MW/sf

cc: Barry Rose President (O.N.H.W.P.)
Dave Betts O.N.H.W.P.
George Stinston O.N.H.W.P.

The position of the above parties is consistent with and corroborated by the evidence brought before this Tribunal. We cannot agree with Mr. Chiu that the Act contemplates a warranty to extend indefinitely and under extraordinary conditions. The particular windows have been installed in every house in the subdivision and the only complaint appears to be when Mr. Chiu's are sprayed with a force of water from a hose or a sprinkler - a force for which they were neither designed nor expected to withstand.

There is little precedent to which we can refer, but the appeal of Dominico Cappelletti heard on August 2, 1990 by this Tribunal and reported in Volume 20 CRAT Summaries of Decisions (1990) p.123 was not dissimilar on the facts. The Tribunal's decision is as follows:

The Tribunal finds that, on the evidence presented, the Applicant has not proved the existence of any defect with respect to the windows or the workmanship in installing them. The fact that the windows may permit water to enter under pressure of the hose is not indicative of a defect. If there were water penetration during a rainfall or snow storm, it would be a different matter since windows are designed specifically to prevent such penetration.

The evidence by all the parties is that no such leakage occurs and therefore the claim of the Applicant must fail.

In the matter before us, we can find no evidence of defective materials or workmanship in the windows and, therefore, can reach no conclusion other than that this appeal must fail.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

ROMEO A. CHOSA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:

CAROL A. STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 26 July 1991

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has considered the Program's application for dismissal of this application based upon the absence of the Applicant, Mr. Chosa and of his counsel. In examining the exhibits and in particular, Exhibit 1, the attachment being the letter dated March 1, 1990 from the Ontario New Home Warranty Program to Mr. Romeo Chosa, the Tribunal notes the paragraph in the decision of the Program at the top of page 2 which reads as follows: "In short, the Program will honour claims in the amount of the deposits you have paid to the builder. You may consider this a decision of the Program."

The Tribunal is of the view that basically, therefore, there is no need to appeal that decision of the Program. The Program has acknowledged its acceptance of the claims under Section 14(1)(a) of the Act to the limits imposed under Regulation 726, Section 6(1). However, there is a second obligation of the Applicant Mr. Chosa to come within the decision made by the Program. That obligation is to satisfy the Program that he has made deposits on the six Agreements of Purchase and Sale to the amount of \$20,000 in each case. This has not yet been done and, in fact, while the Program has filed as Exhibit 7 a book of documents, those documents have not been proven before this Tribunal. Therefore, the Applicant in accordance with the letter of the Program dated March 1, 1990 has an opportunity to prove his claim before the Program.

In the event that the Program disallows his claims, in full or in part, with respect to each of the six Agreements of Purchase and Sale, this Tribunal directs the Program to issue a further decision letter outlining the nature of its disallowance in accordance with the provisions of Section 16(1) of the Act; from which decision, the Applicant will have the right to appeal to this Tribunal under the provisions of Section 16(2).

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Vice-Chairman in the presence of the other members who concurred.

KELLY COMEAU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
DAVID APPEL, Vice-Chairman as Member
D.H. MACFARLANE, Member

APPEARANCES:
KELLY COMEAU, appearing on her own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 17 January 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Ontario New Home Warranty Program dated January 10, 1990 to disallow certain claims of the Applicant Kelly Comeau. The home in question is situate at 6558 Treviso Terrace in Mississauga. It was built by a builder known as Beaverbrook Estates Inc. and was purchased from that company by its first owner who took possession in September of 1987. The Applicant purchased the home from the first owner in November, 1988.

After moving into the house, the Applicant became aware of two problems of which she subsequently made complaints to the Ontario New Home Warranty Program. The first of these was a crack in a basement wall through which water was able to enter and did enter the basement and the second was a problem with the separation of the joints of the tops of the drywall sheets forming the surface of the interior walls on the second floor from the ceilings in the hall and various rooms.

The evidence disclosed that the first owner had complained of these defects to the builder, but had given no notice thereof to the Program. By way of a letter written on October 10, 1989 and received by the Program on October 25, 1989, the Applicant gave notice of a claim against the Program for these defects. The Applicant also complained to the builder and, as a result, the builder came back and remedied the crack in the basement wall. It

was agreed by the parties that this problem has been resolved and is no longer an issue.

The Applicant established to the satisfaction of the Tribunal that the damage to the joints of the drywall at the top of the interior walls to the ceiling on the second floor was the result of faulty workmanship and, if the Program had been notified of the resulting defects in the home within one year, the Applicant would have been entitled to succeed herein with a claim for breach of warranty under Section 13 of the Act. Indeed, the Program conceded that this was so.

The Applicant's problem here is that notice was not given to the Program within one year as required by subsection (4) of Section 13 of the Act. The Applicant attempted to bring her claim within clause (c) of subsection (1) of Section 14 claiming that her damages in this respect were caused by a major structural defect as defined in the Regulations. This definition is set out in clause (o) of Section 1 of Regulation 726, the relevant part of which reads:

- (o) "major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,
- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purposes for which it was intended.

The evidence of Richard Johnston, a conciliator working from the Brampton office of the Program, who has had considerable experience in dealing with problems of construction, established to the satisfaction of the Tribunal, that the damage with which we are concerned here was caused by what is called "truss uplift". The roof of this house is supported by trusses which, in the normal course of temperature changes during the year, experience movement in the bottom or base part of the triangle which forms each truss. The bottom of the trusses are covered by the insulation put in the attic to insulate the ceilings and they keep a fairly constant temperature. The upper part of the trusses are out in the open and expand and contract with temperature changes

with the result that the bottom or base of the trusses move up and down.

This is normal and causes no problem in itself. However, if ceilings underneath are fastened to the bottom of these trusses too close to the interior partition or walls, this movement will cause the damage which the Applicant has here and, in fact, did so in this case. The Program is well aware of the problem and has issued a special Bulletin, a copy of which it tendered as an Exhibit at this hearing, instructing that there be specified distances between the fastenings of the ceiling and all interior walls or partitions so that the trusses can "float" and not cause this type of damage. Mr. Johnston said that in this house, the installation of the ceilings did not allow for enough float. I have set this out at some length to explain clearly why the defective workmanship was in the installation of the drywall rather than with the trusses themselves.

It is the decision of the Tribunal that such does not constitute a "major structural defect" as defined in clause (o). It did not result in failure of any load-bearing portion of the building or adversely affect its load-bearing function, nor did it materially or adversely affect the use of the building for the purpose for which it was intended.

The Tribunal has dealt with the issue to be determined here in previous decisions, to some of which counsel referred us during argument. The first of these was the case of Dr. Louis Fields found in volume 11 CRAT (1982) at page 88; a case heard in October of 1982. In the second last paragraph on page 92, the Tribunal states:

The use of the word "major" in the all-important phrase "major structural defect", which was devised by the Legislature in its wisdom when it framed this Statute, was almost certainly deliberate. Without it we are left with two words only viz. "structural defect" and the warranty would apply to anything qualifying for that bare definition. But it doesn't, because the Legislature has used the word "major". The defect must therefore be "major" to be warranted. In this case that has not been proven, although the onus is very clearly upon a claimant to do so in order to succeed.

At the top of page 93, it is stated:

In passing, the Tribunal notes that the use of the word "major" implies the fact that there exists an antonym to that word or complementary opposite which is the word "minor". That is to say, the concept of a "major structural defect" implies the complementary concept of a "minor structural defect". The Legislature must have had both such kinds of deficiencies in contemplation - one warranted and one not warranted.

Indeed, in this case, the Tribunal can say what it said in the Field case in the first paragraph at the top of page 92 that:

The Applicant(s) had our sympathy throughout the hearing. But that alone was not, of course, sufficient to permit the Tribunal to fulfil its function in their (her) favour.

Another decision to which we were referred was that of the case of Dr. Sleem Feroze, a more recent decision following a hearing in July of 1990, in which two of the members of the panel in this case took part. At the bottom of page 6, the Tribunal states:

The burden of proof was on Dr. Feroze to demonstrate the existence of a major structural defect...Based on the photographic evidence and the proof presented, Dr. Feroze failed to prove that any deficient workmanship had produced a failure in any load-bearing portion of the home or any adverse affect or deficiency in the function of the home.

Reference is also made in that judgement to three other decisions which support this proposition, namely, the Kennedy case (1982) CRAT Volume 11, p.109; the Kenneth Earley case (1986) CRAT Volume 15 at p.136; and the Marilyn and Murray Ferguson case (1987) CRAT Volume 16 at p.150.

Accordingly, by virtue of the authority vested in it under 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

JOHN W. CRATE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN HURLBURT, Member

APPEARANCES: JOHN W. CRATE, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 22 May 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program contained in a letter dated August 29, 1990 and sent to the Applicant whereby it disallowed a claim by the Applicant based upon some ten defects in his home.

There is no dispute between the parties as to the relevant facts although some of these are quite unusual. In fact, at the hearing the Applicant, through his own evidence which was given in a very forthright and straightforward manner, through documents which he produced which were not questioned by the Program and through calling two witnesses from the Program who were knowledgeable of the matter, established all of the relevant facts so that counsel for the Program accepted the facts as presented by the Applicant and called no evidence.

It was further conceded on behalf of the Program that complaints concerning the ten defects in question were made within the time limited and that, provided the one issue to be determined by the Tribunal should be determined in the Applicant's favour, his claim should be allowed.

The relevant facts are as follows: On May 2, 1988, the Applicant and his wife as purchasers entered into an agreement in writing with Sun-Spec Design-Build Corporation as vendor to purchase a piece of real property shown as Lot 26 on a site plan in the Town of Caledon for the sum of \$222,000. At the time of

the signing of the agreement, the lot had no buildings on it and a good part of it was covered with trees. The agreement provided that there should be a house constructed on the lot which was to be substantially completed before a closing date which was fixed for July 31, 1988. It is to be noted that the Applicant's wife was a co-purchaser with him on this agreement and she is not a party to the proceedings, but the Program raised no issue about this and, in view of its concessions made at the hearing as aforementioned, there is no bar to the relief sought by the Applicant on this ground.

The Offer of Purchase and Sale was in a standard form used in Ontario and contained a paragraph which set out the Ontario New Home Warranty Plan registration number of this builder. Under the heading of "Construction", it was provided that the Vendor should complete the Dwelling in accordance with certain plans and specifications and that the Purchaser might not enter the property unless accompanied by a representative of the Vendor. There was attached a Schedule "A" with 50 listed items pertaining to the house to be constructed. What was unusual was that 25 of the 50 items were struck out completely and 7 more were partially struck out. Also some were added, but this is not unusual. As well, a letter was given by Sun-Spec permitting the purchasers to enter upon the property at any time during the period of construction. A copy of the Offer to Purchase is found at Tab 4 of Exhibit 4 and Tab 5 of Exhibit 5 and a copy of the letter aforementioned was also filed as an Exhibit.

The items which were struck out of Schedule "A" included the plumbing, the electrical system, a good part of the heating system and all of the interior drywall, the interior trim, the kitchen and bathroom accessories, the vinyl flooring and carpeting and all internal finishing as well as some other items. The evidence established that all of these items were to be and, in fact were, provided or installed by the Applicant. It is clear from the evidence and this corroborative documentation that it was contemplated at the time when the Offer was signed that as the building of the house progressed, Sun-Spec and the Applicant should work either together or at least at the sametime to do their respective parts of the work. The Applicant stated that the purchase price was negotiated accordingly.

The home was enroled by Sun-Spec with the Program and the fee therefor was paid by the Applicant to Sun-Spec which in turn paid it as required to the Program. The Program issued a Warranty Certificate for this home on March 13, 1990. Construction of the home was delayed for one reason and another so that the closing was postponed to December 6, 1988 when the transaction was closed and the purchasers took possession.

It was agreed by both parties that the Applicant was responsible for all the items struck out in Schedule "A". He installed some of them himself, for some he used Sun-pec's sub-contractors, but made his own arrangements with them and paid them directly, and for some of these items, he used other sub-contractors which he engaged and paid.

There was some issue taken at the hearing between the parties as to whether all Sun-Spec contracted to build was "a shell" and whether the two parties were, in fact, joint builders of this home. In view of the conclusions reached by the Tribunal, nothing turns on whether this terminology is applicable or not.

In any event, after taking possession, the Applicant made complaint to the Program as to defects and, at its request furnished a copy of the Offer to it. Thereafter a conciliator from the Program, Mr. Jim Fortune, attended at the home for conciliation with the Applicant and his wife. The representative of Sun-Spec, although notified, did not attend. During the conciliation meeting, the Applicant made it clear that he had done and been responsible for certain work upon the home, but the extent of his responsibility in this regard was not understood by Mr. Fortune. This misunderstanding was not, however, the result of any misrepresentation on the part of the Applicant, but rather arose from the fact that discussion was confined to the items of complaint and, since the Applicant very properly confined his complaints to items for which Sun-Spec had been responsible, the discussion included very limited references to the fact that he, the Applicant, had undertaken a substantial part of the construction.

One of the complaints was that Sun-Spec had improperly framed a certain skylight so that the drywall did not finish properly around it and it required some additional trim to get a proper finish. Pursuant to the arrangements between the parties, it had been the responsibility of the Applicant and not Sun-Spec to install both the drywall and the interior trim, but since the cause of this defect had been the improper framing of the window, which was Sun-Spec's responsibility, it was necessary for Applicant to make some explanation of these different responsibilities in order to lay the proper basis for this complaint and it was from this which the conciliator drew his inferences as to the division of responsibility. The conciliator did not at this time see a copy of the Offer or the schedule.

Following a conciliation, the Program agreed that these ten complaints were justified and when Sun-Spec would not remedy them obtained three estimates from contractors as to the cost of

repairs which estimates showed that altogether, there was a substantial amount of cost to be involved. It was only after all this had been done that the officers of the Program dealing with the matter had a meeting with the representative of Sun-Spec in their offices and realized the extent of the items of construction of the home undertaken by the Applicant. The Program thereupon reversed the decision which it was proceeding to implement and denied the claim upon the ground that this home in the circumstances of the case did not qualify for a warranty and the purchasers were not covered. This is the sole issue to be determined by the Tribunal upon this hearing.

It is conceded by the Program that, if the issue is determined in favour of the Applicant, he is entitled to have the defects which were identified by Mr. Fortune remedied or to receive compensation therefor as ascertained as aforementioned by the Program. Both parties are in agreement with this and the Tribunal, therefore, need go no further into these issues. On the other hand, if this vital issue is determined in favour of the Program, the enrolment fee should be returned to the Applicant.

It would appear that the Applicant has a good claim against Sun-Spec for damages for breach of contract upon which he could get a judgment for whatever loss he can show as a result of those defects. That is not, however, the issue at this hearing. To succeed here, he must bring himself within the wording of the relevant sections of the Ontario New Home Warranties Plan Act and specifically that he was covered by the warranty provided in Section 13 thereof, and is entitled to compensation pursuant to Section 14 thereof. To do this, he must show that he is an "owner" within the definition set out in Section 1(g) and that Sun-Spec is a "vendor" within the meaning of section 1(n).

- (g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;
- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under contract with an owner.

Upon the foregoing facts, the Applicant is clearly an owner within the meaning of clause (g) provided Sun-Spec is a vendor within clause (n). However, on the facts the Tribunal must come to the conclusion that Sun-Spec is not a vendor for this purpose. The "sale" by Sun-Spec to the Applicant was made by the completion of the contract of purchase and Sale dated May 2, 1988.

This contract provided for two obligations on the part of Sun-Spec and one obligation on the part of the Applicant. The two obligations on the part of Sun-Spec were to sell and convey on closing date to the purchasers the lot which was then vacant and covered with trees, and the second obligation was to do certain part of the building of the home thereon. The obligation on the part of the Applicant to Sun-Spec was to pay certain monies to it on certain dates as specified in the contract.

This was not, therefore, the sale of a home on May 2, 1988. This problem which I have just outlined arises in every case where a builder enters into a contract to sell a home to be built and that is the reason that the last clause was added to the definition "and includes a builder who constructs a home under a contract with the owner". It is pursuant to this clause that the normal purchaser of a house to be built gets warranty coverage under the Act. Unfortunately, the Applicant was not such a normal purchaser. To get within this provision, Sun-Spec must be found to be a "builder" within the meaning of Section 1(a) of the Act.

- 1(a) "builder" means a person who undertakes the performance of all the work, the supply of all the material necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

Sun-Spec Design-Build Corporation is clearly a person within the meaning of the word as used here, but it did not undertake the performance of all of the work or the supply of all of the materials necessary to construct a completed home. In determining this issue, however, it must be taken into account that the practice of the Program, which is supported by common sense, is that the performance of relatively small amounts of work or the supply of relatively small amounts of material by the owner or by some third party will not take the home out of the definition and vitiate the warranty. The question is how extensive can these contributions be before they take the home out of the definition.

The Tribunal was told at the hearing that the Program has a general rule of thumb to the effect that the undertaking of the builder must include the services - plumbing, heating, electrical, etc. In this case, the undertaking of Sun-Spec did not include these services and in looking at the total picture, the Tribunal must come to the conclusion that the contribution undertaken by the Applicant in this contract, both as to the work to be performed and as to material to be supplied, was so extensive that Sun-Spec was not a builder who undertook all of the work and supplied all of the material to construct a completed home.

The Applicant stressed the fact that the home was enroled by Sun-Spec, that he paid the fee to the builder, that a certificate was issued purporting to provide him with a warranty and that, up to a certain time the Program believed that he was covered. However, failure to enrol a home or pay the fee on the part of a builder does not deprive an owner of coverage if he is otherwise entitled to the same and, likewise, the enrolment of a home not qualified does not render the Program liable.

Having reached the foregoing conclusion, it seems appropriate in the circumstances to require that the return of the fee which was paid to the Program by Sun-Spec with money paid to it by the Applicant be made by the Program directly to the Applicant.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs:

- 1) The Ontario New Home Warranty Program to disallow this claim; and
- 2) the Ontario New Home Warranty Program to repay the fee received by it for the enrolment of this home directly to the Applicant.

DITON CONSTRUCTION (ONTARIO) LTD.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
SELWYN CHARLES, Member
ALBERT LONGO, Member

APPEARANCES:

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 18 December 1991 Toronto

REASONS FOR DECISION AND ORDER

The Registrar served a Notice of Proposal dated the 5 day of December, 1990 to revoke the registration of the appellant company on the grounds that having regard to its financial position, the company could not reasonably be expected to be financially responsible in its undertakings as required by section 7(1)(c)(i) of the Ontario New Home Warranties Plan Act.

The company appeals from that decision and although duly served with a date and time reserved for this hearing has failed to attend or be represented by its solicitor with whom correspondence had been carried on by the Registrar of this Tribunal.

The matter, therefore, proceeded in its absence and evidence was tendered by the Registrar that the Program had advised the company of the expiration of its registration on August 7, 1991 as a result of its failure to file an application to renew.

Although the Proposal to revoke may have had certain validity when it was issued on December 5, 1990 the company then still being registered, it has none today since there is no registration to revoke. There are, therefore, no grounds upon which the appellant can now appeal and the appeal must fail. This Tribunal consequently is without jurisdiction to entertain the matter.

FRANK D'ONGHIA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:
FRANK D'ONGHIA, appearing on his own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 17 July 1991 Ottawa

REASONS FOR DECISION AND ORDER

This is a claim under the Ontario New Home Warranties Plan Act brought by Frank D'Onghia against the Program in respect to the construction of his home. During the course of the hearing, it was conceded by the Program that there were some claims for which Mr. D'Onghia should be compensated and estimates were provided by the Program's Senior Conciliator. In considering the estimates, the Tribunal was faced with the difficulty that Mr. D'Onghia had not in many cases provided similar estimates. Accordingly, the Tribunal has endeavoured to be reasonable in assessing the value of each allowable claim so as not to be unduly hard upon the Applicant.

At the hearing, there were some 41 claims reviewed and on the basis of the evidence presented the Tribunal has evaluated the claims as follows:

1. Replace all 2.5-inch sills with 5-inch sills
in one continuous strip

The claimant asked the Program to replace all 2.5-inch marble sills with 5-inch sills in one continuous strip and to replace broken ceramic tiles. The basis of his complaint was that in the model homes the marble sills between rooms were 5-inches in width. The Program's position was that there was no defect in

workmanship, materials or Building Code requirements in respect to the marble sills and that what had occurred in this instance was a substitution, but the substitution section of the Regulations did not come into effect until June 30, 1988 and this Agreement of Purchase and Sale was executed June 7, 1987. Moreover, the Agreement of Purchase and Sale provided the vendor with the right to alter plans and specifications or substitute materials without notice. With respect to the broken ceramic tiles, the Program's position was that this was not reported within one year from the date of possession.

The Tribunal agrees with the position of the Program in respect to these items.

2. Doors not closing properly

The Applicant complained that the doors in the master bedroom and the laundry room did not remain open, but had a tendency to close on their own volition. He also indicated that the doors were hung on an angle, but no evidence in support of this claim was provided. The Program's position was that this complaint was attended to by the builder prior to the inspection on January 12, 1990 and that no defect was viewed by the Program's inspector on that occasion or subsequent inspection on July 13, 1990. Accordingly, the Tribunal denies this claim.

3. Squeaky floors

The Applicant indicated that the builder did fix these floors, but that the problem is recurring. The Program's position before the Tribunal was that the floors had been corrected by the builder and that any subsequent squeaking if it has occurred is outside the warranty. The Tribunal agrees with the position of the Program in respect to this item.

Items 4, 5, 6, 7 and 12

all relate to painting throughout the house.

The Program described the application of the paint as adequate, but did acknowledge that some clean-up was required at a cost of approximately \$25 - 50. The Program also indicated that its inspection of the steel lintels indicated that this work had been satisfactorily completed. The Applicant indicated that the Program had advised him that it would provide a cash settlement offer in respect to painting, but that this had not been submitted by the Program to this time. The Applicant also objected to the

matching of the colour on garage doors in relation to the colour on the front door. From the photographic evidence submitted, the Tribunal noted that there was a considerable distance between the garage door and the front door and that the front door was under an overhang which could cause certain shadows upon the door. Photographic evidence did not clearly support the Applicant's position however.

The Applicant also complained about the decoration on the garage wall. The Program acknowledged that there was some minor work and clean-up necessary with respect to the windows in the house and estimated the value of labour and materials in the amount of \$300. The Program's estimate of painting rectification throughout the house, therefore, would appear to be in the range of \$350. In the absence of any evidence of the cost of such painting as submitted by the Applicant, the Tribunal is of the view that it should allow something in excess of the \$350 acknowledged by the Program and accordingly assesses this claim for compensation to the Applicant at \$600.

8. Item 8 was conceded by the Applicant.

9. Cracks throughout house to be fixed

The Applicant complained about cracks throughout the house. The Program's position was that these are normal shrinkage of materials and are, therefore, excluded by virtue of Section 13(2) of the Act with which the Tribunal concurs.

10. Thermostat does not work properly

The Applicant complained that the thermostat fan did not always work. The representative of the Program testified that on his inspections, the thermostat always activated the furnace. No evidence was submitted by the Applicant and, in fact, it was suggested that in the absence of air conditioning, there would be no requirement for continuous operation of the fan.

The Tribunal finds that the Applicant has not proven a warrantable claim in regard to this item.

11. This item was conceded by the Applicant as were Items 13, 14, and 15.

16. No air circulation in laundry room

The Applicant complained about poor air circulation in the laundry. The Program's inspector indicated that he found no problem with this item and it had not been included by the Applicant in his Proof of Claim.

The Tribunal finds that the Applicant has not proven this claim.

17. This item was conceded by the Applicant.

18. Chimney Cap to be redone

The Applicant indicated that the chimney cap was repaired in the Fall of 1990 and that he had no problem over the past winter or to date. The Program acknowledges that there is a one year warranty in respect to this item and that the warranty continues until September 1991. The Tribunal finds as a fact to the date of the hearing, there is no claim but if a problem develops before the expiry of the one year warranty on the repairs, provided that the Applicant gives notice to the Program in writing, this item will be the responsibility of the Program.

19. Item 19 was conceded by the Applicant.

20. Some closet doors do not close properly

The Applicant complained about closet doors not closing properly and that there were two different paints (one high gloss and one flat) used on the master bedroom closet doors.

The Tribunal is unable to determine the question of the closing of the closet doors from the evidence submitted by the Applicant, but is prepared to accept the Applicant's evidence with respect to the paint on the closet doors and determines that the Applicant should be awarded the sum of \$75 in respect to this claim.

21. Item 21 was conceded by the Applicant.

22. Basement floor full of cracks

The Applicant complained about cracks in the basement and both the Program and the Applicant agreed that the builder had attempted repairs by pouring a second 1.5-inch concrete slab over the entire basement floor area. The Program submitted that hairline cracks which developed subsequently are not warranted with which the Tribunal agrees, but the Program also acknowledged that replacement of the second slab rendered the removal of the furnace filter and access to the plumbing clean-outs impossible, and the Program ordered the builder to rectify these problems which, in fact, the builder did not do.

The Applicant also submitted photographs which showed footprints over the floor. There was nothing structurally involved with such footprints, but the Program representative indicated that they could probably be removed by either a mild acid wash or painting. With respect to the remedial work required, the Program estimated the cost of raising the furnace to be \$145, the cost of repairing the plumbing clean-outs and adjusting the riser from the basement stairs to be a further \$375 and the costs of an acid wash or painting to be \$200. This totals \$720 and the Tribunal finds this amount to be covered under the warranty.

23. Mildew and Humidity in cold storage and basement

The Applicant complained about mildew and humidity in the cold storage room and basement, but acknowledged that there was no longer a water problem. The Program's position was that there is no warranty in respect to damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation as set out in Section 13(2)(e) of the Act.

The Tribunal finds that the Applicant has not proved a warrantable claim in regard to this item.

24. Water comes into cold storage room through foundation wall

The Applicant complained about water coming through the foundation wall in the cold storage room, but acknowledged that the last leakage was a year ago and that he was not having a current problem. The Program conceded that if, in fact, a problem of water reoccurred, such would be warranted provided that the Applicant gave immediate notification to the Program so that the matter could be investigated.

25. Item 25 was conceded by the Applicant.

26. Sensor on light post

The Applicant complained that the sensor on the light post was not properly working. The Program acknowledged that the light post had been replaced, but that the Program had not considered the sensor as part of the Applicant's complaint within one year of possession. The Applicant on the other hand indicated to the Tribunal that he thought the sensor was an integral part of the light post which was to be repaired. The Program's assessment of the cost of replacement of the sensor was \$50, but the Tribunal is of the view that an allowance of \$75 should be made to this Applicant.

27. Garage door panel

The Applicant testified before the Tribunal that the garage door panel had been cracked and was replaced and painted gray so that it is quite different from the balance of the interior of the door of the garage. He also complained about the weather stripping applied by the builder. The Program took the position that the weather stripping was acceptable, but conceded that the door panel should be painted. The Program's assessment of labour for painting and for any adjustment to the door would be \$190. The Tribunal awards the Applicant the sum of \$200 to cover this item.

28. Slabs on side entrance

The Applicant complained that the builder had not properly installed a slab walkway to the front door or to the side of the house. The Applicant gave evidence that he had purchased slabs and installed them at a cost of \$66. The Tribunal is prepared to give the Applicant an allowance of \$125 for this item to cover the cost of material and installation.

29. The Applicant conceded this item.

30. Patio screen and door

The Applicant complained about the patio screen door in that he had difficulty in operating the door. The Program investigator disagreed with this claim and accordingly, the Tribunal finds that this claim has not been proven by the Applicant.

31. Sod was never rolled

The Applicant objected to the installation of the sod. The investigator for the Program indicated that in his assessment, the sod was satisfactory and that there was no drainage problem and, therefore, the matter was not covered under the warranty of the Act. The Tribunal concurs in this decision of the Program.

32. Munton bar on living room window

The Applicant complained about the broken munton bar on the living room window. The representative of the Program indicated that he was unaware that the munton bar was a replacement and it, therefore, should have been warranted. He estimated replacement cost to be between \$30 and \$45. The Tribunal is prepared to allow the Applicant the sum of \$75 in respect of this item.

33. Trees

The Applicant testified that he supplied and planted trees which subsequently died. The monies provided for these trees was given by the builder. According to the Applicant the trees died and he had to replace them, but the photographic evidence filed with the Tribunal shows trees and shrubs growing. It was submitted by the Program that this is a landscaping matter and excluded from the warranty and the Tribunal is not prepared to grant a claim to the Applicant in regard to this item.

34. This item was conceded by the Applicant.

35. Tile in Master Ensuite and Main Washroom

The Applicant complained about a loose tile in the master bedroom ensuite bathroom and a loose faucet in the main washroom. He admitted, however, that such complaints were not made within the first year of possession. Accordingly, the Tribunal disallows the Applicant's claims with regard to these items.

36. Garage and side doors interfere with each other

The Applicant complained with respect to the garage and

side doors interfering, but this claim was not submitted within the first year of possession and accordingly, the Tribunal disallows this claim.

37. Cold storage room not finished

With respect to the cold storage room being unfinished, the Applicant submitted that there should have been taping and painting of the drywall. Nothing specific in this regard was contained in the Agreement of Purchase and Sale and it was not included specifically in the extra sheets which were filed. Accordingly, the Tribunal disallows this claim.

38. Tile in shower

The Applicant complained about a tile in the shower around the shower head and the representative of the Program acknowledged that the builder was obligated to effect this repair which he had not done. The estimate by the Program's representative of the cost was \$35. The Tribunal is prepared to allow the Applicant the sum of \$50 for this item.

39. Stair Railing Uprights

The Applicant complained about loose spindles on the stairs and the Program representative acknowledged that there might be some wobbly spindles. The Program representative also found a very slight roughness on the spindles. The Applicant testified that the spindles had been fixed by the builder, but they had become loose again. The Tribunal is of the view that the Applicant has made out a claim in this regard and allows the sum of \$125 in satisfaction of this claim.

40. This item is conceded by the Applicant.

41. The Applicant claimed that the water pressure was not satisfactory in the main bathroom. The Program's representative indicated that in his assessment, it was satisfactory and that there was no specification in the Building Code requiring a greater pressure than that which was in existence. Accordingly, the Tribunal disallows this claim of the Applicant.

In totalling all the claims for which the Tribunal finds there is a warranty, the Tribunal concludes that the Applicant is entitled to compensation in the amount of \$2,045 and that there are

two items of a continuing warranty, namely, Item 18, the chimney cap and Item 24, the water leakage.

At the conclusion of the hearing on July 17, 1991, the Applicant submitted argument. The Tribunal instructed counsel for the Program to submit written argument by August 6, 1991 and the Applicant to respond by August 24, 1991.

Counsel for the Program submitted his written argument under date of August 6, 1991, but no argument was received by Monday, August 26, 1991 from the Applicant. Since dictating these reasons, the Tribunal has received a written objection from Mr. D'Onghia to the argument of counsel for the Program, and included with the written objection were estimates to support Mr. D'Onghia's claim against the Program.

In reviewing the submission by Mr. D'Onghia, the Tribunal noted, however, that it had been forwarded by Priority Post from Ottawa on August 21, 1991 and notes that at the time there was a mail slow down and rotating strikes. Accordingly the Tribunal is prepared to acknowledge that the submission by Mr. D'Onghia was received properly. Unfortunately, the submission by Mr. D'Onghia simply stated that he was not in agreement with the written agreement submitted by counsel for the Program and was forwarding estimates in respect to the work which he claimed. The difficulty for the Tribunal is that the estimates cover all of the items contained in the Applicant's claim, many of which have not been allowed by the Tribunal. Furthermore, counsel for the Program has had no opportunity either to examine the estimates or to deal with their submission in cross-examination. Such estimates would, therefore, violate the hearsay rule and, in any event, should properly have been submitted during the course of the hearing and not as part of the Applicant's reply argument.

Notwithstanding the technical position, however, the Tribunal is prepared in this decision to make comparisons between its decision and the estimates provided by Mr. D'Onghia.

With respect to Items 4, 5, 6, 7, 12, 20 and 27, all of which deal with painting both interior and exterior, the Tribunal allowed the sum of \$600 for Items 4, 5, 6, 7 and 12, \$75 in respect to Item 20 and \$200 for Item 27 for a total of \$875. In the estimates submitted by Mr. D'Onghia, the total including GST was \$1,685.25 in one and \$1,765.50 in the other. These estimates, however, covered additional work from that for which the Tribunal is prepared to allow Mr. D'Onghia and, accordingly, the Tribunal is satisfied that its allowances totalling \$875 are fair to the Applicant.

With respect to Item 22, the correction of the basement floor, including the elevating and replacing of the furnace and the cleaning of the basement floor, the Tribunal allowed the sum of \$720. In the one estimate provided by Mr. D'Onghia, approximately \$400 related to these items. Two further estimates, each in the amount of approximately \$21,000 were based on the removal and replacement of the basement floor and are far beyond what the warranty in the Act would cover. The Tribunal is, therefore, satisfied that its allowance of \$720 is fair to the Applicant.

With respect to Item 26, the replacement of the sensor, the Tribunal allowed the sum of \$75. In the two estimates provided by Mr. D'Onghia, one was for \$150 and the other \$160. Not having any way to evaluate properly what was the basis of these estimates, the Tribunal is satisfied that its allowance of \$75 is fair to the Applicant.

The Tribunal allowed \$125 for concrete slabs in Item 28 and \$75 for a muntion bar in Item 32, neither of which items were addressed in the estimates from Mr. D'Onghia.

With respect to Item 38, the tiles in the shower, the Tribunal allowed the sum of \$50. The one estimate from Mr. D'Onghia stated that the tile should be left as is and no amount was estimated for replacement. Accordingly, the Tribunal is satisfied that its allowance is fair to the Applicant.

Item 39, the stair railings, the Tribunal allowed \$125. No estimate was provided by Mr. D'Onghia in regard to this item.

Pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal does hereby direct the Program to pay to the Applicant the sum of \$2,045 in full satisfaction of all claims contained in the Applicant's complaints against the Program with the exception of Items 18 and 24, and does hereby further direct the Program to assess any complaint filed in a proper manner with the Program in respect to the chimney cap and in respect to the water leaking in the basement.

MS. CLARE DUNBABIN and
EDWARD AND ANGELA PIC

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
SELWYN CHARLES, Member
D.H. MACFARLANE, Member

APPEARANCES:

CLARE DUNBABIN and ANGELA PIC,
appearing on their own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 26 November 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program which was communicated to the Applicants by the Program by its sending to Mr. and Mrs. Pic a copy of a letter dated October 10, 1990 from the Program to the builder Losani Homes Ltd. in which the Program has stated that the warranty had expired on the only complaint in issue and, therefore, the Program would be taking no further action. The Program confirmed this position in a letter dated November 8, 1990 sent to all three Applicants. Nothing turns upon the dates of these communications as it is acknowledged by the Program that this appeal was launched on time.

The Applicants purchased their home from the builder, Losani Homes Ltd. by an Agreement of Purchase and Sale made on February 20, 1987. The transaction was closed on March 29, 1987. On November 4, 1987, the Applicant Clare Dunbabin sent a letter to the Program with a list of complaints which included as a sixth number therein: "The ensuite shower leaks". The Program sent a copy of this letter to the builder and on November 18, 1987, the builder wrote to the Program a 5-page letter dealing with all of the complaints and specifically with the complaint in question "6. The ensuite shower will need to be inspected."

The Applicants sought a conciliation meeting to deal with various of their complaints and this meeting was held on March 15, 1988, at which were present Angela Pic and Clare Dunbabin, three representatives of the builder and Mr. John Nielsen, inspector from the Program. In the Schedule "A(1)" attached to his report, Mr. Nielsen refers to "the following items were corrected by the builder prior to this inspection" and these items include "the ensuite shower leaks." The evidence was that the Applicants concurred in that conclusion at that time. They received a copy of this report and Schedule, and they did not dispute this point. And the evidence otherwise indicated that they believed the complaint was remedied until over a year later they saw evidence of further leaking.

Both Clare Dunbabin and Angela Pic gave evidence at the hearing. The following facts were established by their evidence. The shower stall in question is in an ensuite bathroom on the second floor. The leaking which was seen by the Applicants when they made their initial complaint was leaking of water through the front so that water was seen on the bathroom floor. Upon receiving the complaint, the builder had someone come and put additional caulking about where he found the water leaking. After this was done, no leaking was observed similar to that which had been noticed before and for over eighteen months, there was no further sign of water leaking from this shower stall.

In September 1989, Clare Dunbabin noticed some water stains in the dining room ceiling under the shower stall. This was reported to the builder and the builder contacted the installer of the shower stall which, in turn, contacted its supplier. As a result of this, one John Northey, a representative of the supplier attended at the premises and made an inspection. He gave a letter to the Applicants in which he stated that the shower stall had been improperly installed in the first place. He said that, having examined this unit, there appeared to be two areas which may be contributing to the leakage. In the first place, he said that the installation had violated one instruction not to apply certain caulking on the inside of the shower unit and that this would have to be removed to allow water trapped under the unit to drain into the shower base. He went on to say that if doing this does not completely solve the problem, the unit would have to be removed to ensure that caulking had been applied to the bottom of the wall jambs as directed.

Two witnesses gave evidence on behalf of the Program. Myrna Morris, a conciliator with the Program dealt with this second complaint with which we are concerned. She established that the first time this complaint was received in writing was in a letter dated November 21, 1989 from the Applicants to the Program.

She was not able to tell whether the leaking of which the Applicants are now complaining resulted from faulty installation of the shower stall in the first place or from faulty repairs made in March of 1988.

Fred Losani, an officer of the builder company, told first of the action taken to redress the initial complaint. The Program's inspection at that time led to the finding of a leak in the side of the shower, an opening in the silicone caulking which was allowing water to seep through onto the floor of the bathroom. This finding was consistent with the initial complaint of where the leaking water was found by the Applicants. The builder had the installer of the shower send a representative, one V. Pesa, who re-caulked the leaking area with the result that it appeared to be repaired and to remain so.

Mr. Losani also gave evidence that Mr. Northey had only been with CGC (Canadian Gypsum Company) for three months and was not qualified to give the opinion which he did in his letter. The builder had Mr. Pesa go back and look at the unit, and he certified in a letter that:

Upon final inspection this 2200 series shower unit was found to be installed correctly and performing normally. Due to the wear and tear, over a period of time, such items may require adjustment and possible maintenance otherwise they function appropriately.

The Tribunal did not have the benefit of either Mr. Northey or Mr. Pesa as witnesses before it and has only their letters in evidence.

The Tribunal finds on all of the evidence that the leak which was the subject matter of the original complaint and which Mr. Pesa came and repaired, was repaired properly and did not leak again. It also finds that this was the only leak which was reported within the time limited in section 13(4) of the Ontario New Home Warranties Plan Act, namely within one year. The only evidence upon which the complaints which are the subject matter of this hearing are based is the evidence of water stains in the ceiling under the shower stall and what is contained in the letter from Mr Northey.

Upon this evidence, the Tribunal finds that the Applicants have failed to establish that their complaint results from a breach of the warranty contained in Section 13(1) of the Ontario New Home Warranties Plan Act. Furthermore, the claim with

which we were concerned in this hearing was not made within one year after the warranty took effect as required in subsection (4) of Section 13 of that Act.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

MRS. B. DURRANT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:

THOMAS MCRAE, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 21 November 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program dated November 7, 1990. Exhibit #2 filed by the Registrar established that on June 13, 1991, a copy of the Appointment For and Notice of Hearing was sent by prepaid registered post to the Applicant at her address at 2234 Munn's Avenue, Oakville, Ontario. This Appointment and Notice advised of this hearing to be held on this day, November 21, 1991 commencing at 9:30 a.m. at the Tribunal Chambers at 1 St. Clair Avenue West, Toronto.

The Applicant did not appear; the Tribunal waited until after 10:00 a.m. at which time the Registrar advised that the Applicant had not appeared and no message had been received from her. Counsel for the Ontario New Home Warranty Program asked for an order that the Applicant's claim be disallowed.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

HARVEY EASSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
GORDON R. DRYDEN, Vice-Chairman as Member
D.H. MACFARLANE, Member

APPEARANCES:

HARVEY EASSON, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 21 January 1991

Toronto

REASONS FOR DECISION AND ORDER

This is the matter of a claim by Harvey Easson against the Ontario New Home Warranty Program in respect to kitchen cupboards installed in the home purchased by Mr. Easson in Mississauga. The purchase agreement provided for a home to be constructed and sold to Mr. Easson for a purchase price of \$565,000.

In his evidence before the Tribunal, Mr. Easson indicated that he was having his kitchen completed totally white. He indicated that in speaking to the sales staff, he stated that he wanted his kitchen cabinets to be white. As a result, an amendment to the Agreement of Purchase and Sale was entered into, which provided as follows "Upgrade kitchen cabinets to ultra plus 'Allegro High Gloss White' \$3,600.00." He stated in his evidence before the Tribunal that he was informed by the sales staff that the only way that he could have his cabinets white was to make the amendment as stipulated. It is to be noted that the wording in the amendment to the agreement was inserted in the handwriting of someone other than Mr. Easson.

After completion of the purchase, Mr. and Mrs. Easson noticed that the interior of the cabinets in the kitchen was almond in colour. They also noted that the cabinets in the bathrooms had an almond interior. In his evidence before the Tribunal, Mr. Easson indicated that since he had made no request for a change in

the vanities in the bathrooms, he felt he had to accept the almond interior. On the other hand, he was of the view that having agreed to pay an additional \$3,600.00 for his kitchen cabinets, he would have an all white cabinet, including a white interior.

It is to be noted that the witnesses for the Program acknowledged that there was a significant difference in colour when the doors of the kitchen cabinets were open, that the contrast between the white and the almond was quite distinct. The witnesses all stated, however, that when the doors were closed, a white exterior surface was presented in the kitchen. It is of interest to note that the witness representing Canac Kitchens, the manufacturer of the cabinets, stated that now the interior box of the cabinets is white not almond and, it perhaps may be speculated, that there have been other complaints about interior cabinets not being white. The decision of the Tribunal, however, does not turn on this in any degree.

The decision of the Program was as follows:

In the Amendment to the Agreement of Purchase and Sale, your kitchen cabinets were upgraded from high quality furniture finish kitchen cabinets to Ultra Plus "Allegro High Gloss White". It would appear that when you selected these cabinets you assumed that the upgrade would include the interior cabinet box.

I have checked with the manufacturer, Canac, and they have stated to me that the almond interior box sold to you is the standard box made for the kitchen cabinet that you purchased. However, they do have a white interior box which is made for a specific line of cabinets, which is the "Signature" line. This line of cabinets is again a further upgrade of cabinets.

It is my opinion that this item falls under Substitutions Section, 21 of the Ontario New Home Warranty Act regulations...

As the finishes of the interior cabinet boxes are the same in any manufactured cabinet by this manufacturer, whether the colour be almond or white, it is the decision of the Program that this item is not warranted.

Section 21, of the regulations under the Act provides that:

Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement".

It is the view of the Tribunal that there is no substitution in this case. There was, in fact, an agreement to "Upgrade kitchen cabinets". It is the view, therefore, of the Tribunal that the matter in issue is whether there has been a breach of the agreement which would invoke the provisions of the warranty under the Act.

Evidence submitted by the Program was to the effect that everyone in the trade understood that the kitchen cabinet consisted of a box and that the significant portion of the cabinet was the surface doors. While this may be understood within the trade, the Tribunal is not satisfied that this is known by the general public, and particularly, the average purchaser.

In his argument, Mr. Easson submitted that Webster's dictionary defines cabinets "As box, doors and shelves, not doors only". The Tribunal has consulted the Random House Dictionary of English language, unabridged edition, 1971 edition, and finds these significant definitions of the word "cabinet": A piece of furniture with shelves, drawers, etc. for holding or displaying valuable objects dishes etc; an upright box or movable closet for storing goods materials equipment etc; a wall cupboard used for storage, as of kitchen utensils toilet articles etc. The word "cupboard" is defined in that dictionary as, "a closet with shelves for dishes cups etc."

In the view of the Tribunal, by all reasonable interpretation of dictionary definitions and general understanding by the public, kitchen cabinets encompass the whole container, including the doors on the exterior surface. In the view of the Tribunal, it is unreasonable for the Program to suggest that there was an obligation upon Mr. Easson to ascertain what "ultra plus 'Allegro High Gloss White'" meant. The Tribunal was impressed with Mr. Easson in his evidence that what he asked the salesperson for was white kitchen cabinets and that the response was, in order to obtain such, he had to agree to an extra for \$3,600.00 on a trade name basis.

It is the view of the Tribunal that there was an obligation not on Mr. Easson, but on the vendor clearly to identify the fact that what Mr. Easson would be getting for his \$3,600.00 was merely a surface and that he would be receiving an almond interior. In coming to this decision, the Tribunal was most impressed with Mr. Easson as a witness. He indicated his dismay at the interior box of the bathroom vanities, but acknowledged that he had not asked for a change and felt bound to accept them. On the other hand, he had clearly addressed the condition of the cabinets in the kitchen and, in fact, had paid a further \$3,600.00 for white kitchen cabinets.

The vendor could easily have identified in the Amendment to the Agreement of Purchase and Sale that what was being discussed were the doors only, and made it clear to the purchaser that the interior of the cabinet would not necessarily be that colour. In the view of the Tribunal, it was an obligation of the vendor so to do.

Various witnesses in their evidence before the Tribunal indicated that it is possible to correct the interior colour of the cabinets and it is the view of the Tribunal that it may very well be unreasonable to direct that the cabinets be removed, but rather that the interior of the cabinets be painted or otherwise rectified to make the interior of the cabinets white.

Therefore pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal allows the claim of Harvey Easson and directs the Program to paint or otherwise re-surface the interior of the cabinets so that they are white and not almond in colour.

MR. AND MRS. D. EDWARDS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
DAVID APPEL, Vice-Chairman as Member
D.H. MACFARLANE, Member

APPEARANCES:

MR. AND MRS. D. EDWARDS, appearing on their behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 September 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants, Mr. and Mrs. David Edwards from a decision of the Ontario New Home Warranty Program set out in a decision letter dated December 18, 1989 denying their claim with regard to brickwork over their garage doors.

On August 9, 1986, Mr. and Mrs. Edwards purchased the property, being Lot 100 on a Plan to be registered and which was later known as 44 Pickett Crescent in Richmond Hill from Yonge North Homes Limited for \$195,100.00.

At the time the Offer was signed, the house was not constructed and the vendor/builder constructed it later and the transaction was closed as stipulated on July 2, 1987. The Applicants paid the builder its purchase price in full, including some additional payment for extras.

At the time of closing an inspection was made which Mrs. Edwards described as hurried. A number of items were not finished and some things to be completed or fixed, were noted on the Certificate of Completion and Possession which was delivered, but there was no reference on it to the complaint with which we are concerned in this hearing.

The defects with which we are concerned in this hearing are set out in the first paragraph of the aforementioned decision letter:

Further to Mr. Dallaire's visit to inspect your complaint, brick sagging at garage; centre column not straight; cracks to brick veneer above both overhead garage doors; centre column sinking; gaps at garage doors, we have found the following:

1. Cracks to brick veneer mortar joints were evident at the following locations:

Above centre column leading up from lintel to half moon vent, above two corners of garage overhead doors from lintel up to underside of soffit.

2. Sagging at brick veneer soldier course above overhead garage doors.

These problems were identified shortly afterwards along with other deficiencies and there occurred a lengthy series of discussions and correspondence between the Applicants and different representatives of the builder in which, at every occasion until after the one year limitation for reporting these defects to the Ontario New Home Warranty Program had expired, the representatives of the builder assured the Applicants that the deficiencies would be remedied. In fact, all of the other items of complaint appear to have either been remedied or finally accepted by the Applicants, leaving only these in issue before the Tribunal outstanding.

The evidence before the Tribunal as to the bringing of the complaint to the attention of the Program, was the oral evidence of Mrs. Edwards that the first written communication to the Program was sent by the Applicants in September of 1988. The Tribunal was furnished with no copy of this document by either side. The first written document of which we were furnished a copy, was a letter dated June 2, 1989. In any event, the letter sent in September 1988 was well outside the time limit in subsection 4 of Section 13 of the Ontario New Home Warranties Plan Act.

The occupants seek to succeed against the Program upon the basis that the defects identified constitute a "major structural defect" within the meaning of Section 1(o) of the Act and therefore subject to the limitation of four years set out in Section 14(1)(c).

At the conclusion of the Applicants' case, counsel for the Program moved for a dismissal of the claim upon the grounds that the defects established do not qualify as major structural defects and that the right to succeed with a claim based upon them against the Program, expired at the end of one year after the closing of the transaction and the taking of possession of the home by the Applicants. At that time, the Tribunal indicated it would grant this motion and deliver these written reasons therefor later.

None of the items which are the subject matter of the claims before the Tribunal constitute major structural defects as defined. None of them (i) result in any failure of the load-bearing portion of the building or materially and adversely affect its load-bearing functions, or (ii) materially and adversely affects the use of the building for the purpose for which it was intended, mainly a garage and therefore the claim cannot succeed against the Program.

As we indicated at the hearing, this may be a case where the builder is open to some criticism for continuing to promise to remedy the defects and by remedying certain others which gave the Applicant a sense of confidence in its promises until the time limited for reporting to the Program had expired and then failing to deliver on its promises. It may also be a case in which the Applicants have recourse against the builder in another forum.

Upon this last point, if they should wish to pursue it, the Applicants should seek proper advice. However, none of these things can fix any responsibility upon the Program beyond its responsibility fixed by the Statute and the Regulations. Whether or not there was conduct on the part of the builder leading to the Applicants' predicament which should be criticized; there was certainly none on the part of the Program.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

MR. AND MRS. C. ETWAROO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN CORSI, Member

APPEARANCES:

MR. AND MRS. C. ETWAROO, appearing on their own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 26 April 1991

Toronto

REASONS FOR DECISION AND ORDER

This is the decision in the Ontario New Home Warranty Plan claim by Mr. and Mrs. C. Etwaroo in respect of the decision of the Ontario New Home Warranty Program pursuant to Section 14 of the Ontario New Home Warranties Plan Act to disallow the claim.

This is a claim with respect to a delayed closing which is provided for under Section 19 of Regulation 726 of the Ontario New Home Warranties Plan Act. Under the provisions of subsection (1):

Every vendor...warrants to the owner that in the event of a delay in closing that is more than five days beyond,

(a) the date originally fixed for closing the purchase agreement; or

(b) an extension referred to in clause 3(a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

Subsection (3) of Section 19 provides that subsection (1) does not apply where:

- (a) the vendor extends the closing beyond the original closing date after giving written notice to the purchaser at least sixty-five days before the original closing date;
(emphasis added)

In order to determine whether the section applies, the Applicant must prove that the delay was more than five days beyond the original date for closing or an extended date and that there was not given 65 days notice prior to that closing date.

The Agreement of Purchase and Sale entered into by Mr. and Mrs. Etwaroo as purchasers and 724848 Ontario Inc. operating as "Bayview Woods" was signed June 11, 1988, accepted June 15, 1988 and provided for a closing of October 29, 1988. The Program produced a handwritten document dated August 21, 1988, which in turn had been produced to it by Mr. Ginsberg of Bayview Woods which document was addressed to Mr. and Mrs. Etwaroo and which stated: "Please be advised that due to circumstances beyond the builder's control the date set for the completion of the sale is extended to February 24, 1989".

This document was on a plain piece of paper signed by Kent Klim identified as "sales representative", but there was no indication that it came from Bayview Woods or the numbered company. Mr. Etwaroo categorically stated under oath that the first time he saw this document was at the hearing before this Tribunal. In Mr. Etwaroo's evidence, he stated that he had attended at the sales trailer on October 21, 1988 and that subsequently the only letter of which he was aware was a letter sent by the solicitor for the vendor to Mr. Etwaroo's solicitor dated October 24, 1988 which letter stated:

Due to difficulties beyond the vendor's control, i.e. the subdivider of the property has only recently completed services to allow the issuance of building permits and building permits are now or will shortly be available. As noted above the Plan of Subdivision has been registered as Plan 66M-2237, Scarborough. Therefore, it has become necessary to extend the closing date. The closing date for this transaction is now scheduled for March 6, 1989, or such other time as the vendor may require pursuant to Paragraph 5 of the Agreement of Purchase and Sale.

A subsequent Fax letter from the vendor's solicitor to Mr. Etwaroo's solicitor under date of November 9, 1988 stated:

We have been contacted by our client. Our client has advised that the purchaser has contacted them and advised that they are not as yet aware of the amended closing date and that they require confirmation of the amended closing date.

That letter also forwarded a copy of the October 24, 1988 letter.

If, in fact, the first written communication to the purchaser is the letter of the vendor/solicitor dated October 24, 1988 no written notice has been given pursuant to Section 19 of Regulation 726 at least sixty-five days before the original closing. It, therefore, becomes important for the Tribunal to consider the evidence which was presented to it in regard to the letter of August 21, 1988.

In reference to that letter, the Tribunal has the sworn testimony of Mr. Etwaroo before the Tribunal that he had never seen this letter prior to the hearing on April 26, 1991. Countering that evidence was the testimony of Joel Ginsberg, legal counsel to Bayview Woods. Mr. Ginsberg indicated to the Tribunal that he was aware of the changed legislation contained in Section 19 of Regulation 726 in June 1988. He also described the administrative staff of Bayview Woods which presumably would have been capable of sending out notices on letterhead of Bayview Woods to all purchasers in subdivisions, in particular such as this subdivision where delays were known to be experienced.

Mr. Ginsberg also testified before the Tribunal that the letter in the file was an original handwritten letter, but that Kent Klim, the sales representative employed by Bayview Woods, had informed Mr. Ginsberg that he had delivered a letter in that form to the purchasers. As indicated, there is nothing on this document to indicate that it is coming from the vendor, unless one has knowledge that Kent Klim is an employee of Bayview Woods and has authority to give such a letter. There is nothing on the letter which is in the file of Bayview Woods to indicate that such letter was received by Mr. or Mrs. Etwaroo or any notation on such letter in the file to indicate that such letter was given to Mr. or Mrs. Etwaroo. The fact that the document is an original handwritten document gives no indication that there was ever another equivalent document prepared, and the Tribunal is, therefore, provided only with the hearsay evidence given by Mr. Ginsberg.

In addition to the document, there is an affidavit sworn by Mr. Kent Klim in which he stated that he did provide the purchasers written notice in that form. The affidavit does not indicate when he provided this and in any event, Mr. Ginsberg indicated that Mr. Ginsberg prepared the affidavit based on the hearsay evidence of Mr. Klim and, in fact, swore Mr. Klim on October 5, 1989. Mr. Klim was not before the Tribunal to be cross-examined on this issue.

In examining the letters written by solicitors for Bayview Woods on October 24 and November 9, 1988, no reference is made to any extended closing date although Mr. Ginsberg testified that Bayview Woods had been consulted by its solicitors before writing such letters. There is, therefore, a further anomaly in the documents presented to the Tribunal that an extension under the August 21, 1988 document was to February 24, 1989 and yet the letter from the solicitor for Bayview Woods makes no reference to any previous extension and gives the impression of being an originally activated letter, which Mr. Ginsberg termed a form letter, providing for a closing of March 6, 1989 which in fact was the actual closing date which took place.

In the face of the clear testimony of Mr. Etwaroo and the lack of any direct refutation of his testimony that he had never received or seen the document of August 21, 1988 and in view also of the ambiguity of letters written by the solicitors for Bayview Woods without an explanation concerning the conflicting dates for closing, the Tribunal finds as a fact that the Applicants, Mr. and Mrs. Etwaroo were not given written notice by the vendor at least sixty-five days before the original closing date and, therefore, have a claim for delayed closing against the Program.

Having reached this conclusion, the Tribunal must then look to the Applicant to prove his "direct costs caused by the delay" under Section 19(1). Mr. Etwaroo had filed with the Program a claim dated April 18, 1989 totalling \$5,490. This would, in fact, be limited to \$5,000 in accordance with the provisions of Section 19(1) of the Regulation. As noted in the Act, the Applicant has the obligation to show that he incurred direct costs. and the application form provided by the Program to the Applicant and completed by him provides as follows:

Where a delayed closing makes it necessary to vacate a previous residence before the new residence can be occupied, reasonable additional living expenses of up to \$100 may be claimed. This would include the cost of accommodation, meals and

incidentals over and above what it would have cost the purchaser had he/she not had to vacate the previous residence. Receipts are required except for incidental expenses of up to \$25 per day.

While it is true the application form does not require receipts for incidental expenses of up to \$25 per day, nevertheless, there must be some reasonable identification of what these incidental expenses consisted of and that they, in fact, had reference to expenses over and above what would be normal expenditures. One could consider a number of expenses which might fit into this category. For example, if one had to move out of a residential premises and into a hotel where there were no laundry facilities, conceivably the cost of laundering might be such an incidental expense. If one had children who went to a school immediately opposite one's residence and now those children had to be transported by taxi from the hotel, this might be another example of incidental expenses.

The evidence of Mr. Etwaroo, however, was most unsatisfactory in this regard. He seemed to be of the view that he was entitled to claim without explanation and without receipts an allowance of \$25 per day. His evidence was also somewhat vague with respect to expenditures which he had occurred. Nevertheless, the documentation which he had filed with his claim did identify the fact that he had paid out \$1,600 for accommodation during December of 1988 and February of 1989 and his oral testimony confirmed this as well.

The Tribunal is prepared to accept the fact that the Applicant did incur expenditures for accommodation during the period between October 29, 1988 and March 6, 1989. In addition, he filed with the Program evidence of payment of insurance for goods stored between December 6, 1988 and March 6, 1989 in the amount of \$75 and the Tribunal is prepared to accept this as an appropriate expense incurred by the Applicant.

With regard to storage costs, there were several receipts, including a public storage management agreement which provided for a monthly cost of \$155. Mr. Etwaroo in his evidence before the Tribunal indicated that he obtained one free month's storage and, therefore, was claiming three months at \$155 per month for a total of \$465. In addition, one of his receipts indicated that he had paid to the storage company the sum of \$16 for the few days in October which seems to have been substantiated by the public storage management contract dated October 28, 1988. The Tribunal is, therefore, prepared to allow this item as well.

These items for which receipts are provided total \$2,156. In considering the balance of Mr. Etwaroo's claim, it is entirely possible that there were additional moving costs which were incurred and that there might have been some incidentals, but the Tribunal is satisfied that these have not been properly identified and reasonably documented before the Tribunal at this hearing. There is an obligation on the Applicant to give evidence to substantiate his claim for compensation which has not occurred in this case.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to compensate Mr. and Mrs. Etwaroo for accommodation, insurance and storage charges as proven in the amount of \$2,156.

MR. AND MRS. J. FEBBRINI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
LOUIS A. RICE, Member

APPEARANCES:
ROBERT J. BANIK, representing the Applicants

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 5 November 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program, rendered October 24, 1990, to disallow two claims by Mr. and Mrs. Febbrini based on defects in the construction of their new home, the whole in breach of Section 13 of the Ontario New Home Warranties Plan Act.

The New Home Warranty Program rejected these claims holding that there were no defects in material, that the home was constructed in a workmanlike manner, and that the home satisfied the Ontario Building Code.

Of the two claims, the most important deals with the construction of the stairs. The Febbrinis complained that the stairs were improperly constructed because they did not allow proper access to the upstairs. They stated that the box springs of a queen size bed could not be moved to the upstairs bedrooms. This resulted from the failure of the builder to provide a drop gap of 6" between the upper floor balustrade and a handrail for the stairs around which the stairs would wind. This reduced the area in the stairwell considerably and accounted for the inability to move bigger furniture upstairs.

The second complaint was that the front door did not operate properly.

The first witness to testify was Mr. Febrini who on September 7, 1988 entered into a contract with the builder to construct a home whose model name was the "Kleinburg" for the sum of \$203,990. The price paid was the asking price.

Mr. Febrini moved into the home in April 1989. He stated that he had problems with the front door in very cold weather. He could not unlock the door without breaking the key. When opening the door from the inside, it was extremely difficult for him to pull it open. This problem occurred within the first year of his taking possession of the home.

In sunlight, the door ceased to jam. Mr. Febrini believed that the problem was with the frame and not necessarily the door. He stated that the frame was bowed and this bowing increased when it was cold.

Mr. Febrini went on to testify that his major problem was with the staircase which was not built in accordance with the building plans. The plans themselves (tab 10 of Exhibit 4) called for a gap of 5" coming down the middle of the staircase. The staircase would wind around that gap. The builder, however, failed to provide the gap resulting in the area in the stairwell being diminished by the 5" promised by the floor plan.

As a result of the diminished area, he could not get all his furniture to the upstairs bedrooms. To correct the problem, the builder cut out about 3' of wall to compensate for the space which the gap would have provided. The solution, however, proved to be insufficient. The box spring of the queen bed, once upstairs, could not be moved downstairs again after the walls were finished. To move it back downstairs would require at the very least his removing and then reinstalling the railing.

Mr. Febrini asks that the balance of the wall between the winder stairs and the living room be removed to provide some of the space the gap would have created.

Mr. Febrini also stated that because of the limited area, to this day he has not been able to completely furnish the upstairs bedrooms.

In cross-examination, Mr. Febrini testified that he had only furnished the master bedroom; the other three bedrooms had not been furnished. He went on to state that even a double bed could not be accommodated by the staircase.

As for the door, he testified that it operated well in summer; in cold weather, however, it became difficult to turn the

lock. One would really have to push hard on the door to get the lock properly aligned. His wife was not strong enough to do this. If outside the home, one could not use the key without breaking it.

The next witness to testify was Mrs. Febbrini. She said that when it was really cold outdoors, she could not push down the latch when inside the home; and when outside, the key would not turn at all. She has been locked out of the home three times because of this problem. She went on to testify that the previous Christmas her sister could not get into the home when she tried to open the door with her key.

As to the stairway, she testified that a neighbour of hers had also bought the Kleinburg model, but that in her home the 5" gap had been provided in accordance with the building plans. In that home, the neighbour did not have the same problems that the Febbrinis faced with respect to their furniture.

She believed the solution to the problem was to open the wall in the manner described by her husband.

The final witness on behalf of the Febbrinis was James Gorycki, a lawyer, who visited their home as well as another Kleinburg model where the gap existed. He found that the other home stairwell seemed wider and the header was much higher.

The New Home Warranty Program has acknowledged the existence of the gap, but takes the position that because the stairwell was constructed in accordance with the requirements of the Ontario Building Code, there is no deficiency in the workmanship. Mr. Zerafa, the construction manager of the builder, was the first to testify on behalf of the New Home Warranty Program.

He testified that while the outside measurements of the home complied with the working drawings, the stairway itself did not. He acknowledged the failure to provide the 5" gap indicated in the drawings.

He stated that the builder voluntarily increased the headroom in the stairwell even though the stairwell itself complied with the Ontario Building Code.

When asked why the gap of 5" had not been provided, he answered "I wish I knew".

The stairway itself was made up of winders which wound around tightly which resulted in very restrained space in the whole of the stairwell. This was to allow for the maximum amount of

floor space for each of the bedrooms on the upper floor.

As for the problem with the door, he testified that it functioned properly when he inspected it.

In cross-examination, Mr. Zerafa stated that the builder was obliged to follow the floor plans whenever possible and admitted that while the plans called for a gap, it was never provided.

He believed that sufficient additional space could be provided by removing the balance of the wall and that the cost to do so would be less than \$1,000 based on retail prices.

The final witness was Keven Rector, a conciliator with the New Home Warranty Program. He visited the Febbrinis home three to four times before the decision was rendered by the New Home Warranty Program.

With respect to the problem with the door, he testified that he went to visit the premises at the end of April or beginning of May 1991 and did not see a problem. He agreed that at that time of the year the weather would be warm and, therefore, the problem would not appear. He stated that he would be prepared to reinspect the door if the Febbrini's phoned during winter to say that there was a problem. He admitted that he was under the impression that the Febbrinis had had no problem the previous winter.

As to the stairs, they satisfied the requirements of the Ontario Building Code. To him this meant that there was no liability on the Program even if the builder did not construct the stairs in accordance with undertakings to follow the building plans.

With respect to the stairway, the Tribunal believes that the claim falls within the provisions of Section 13(1) of the Ontario New Home Warranties Plan Act. The failure of the builder to construct the stairway in accordance with the floor plans and pursuant to his undertaking to do so, constitutes a failure of the builder to construct in a workmanlike manner. The fact that the stairway may satisfy the requirements of the Ontario Building Code does not free either the New Home Warranty Program or the builder of liability.

As appears clearly in Section 13, the home's being constructed in accordance with the Ontario Building Code is only one of the tests for deciding upon whether the vendor has properly constructed the home. In failing to follow its plans, the builder did not carry out the construction in a workmanlike manner. The

failure to provide the 5" was particularly significant in this case since the stairwell was so narrow to begin with. The consequences were enormous in that the type of furniture that one would reasonably expect to be able to install in a bedroom could not be brought up the stairs. The builder knew or should have known that failing to provide the gap would have this result.

Under the circumstances, the Applicants are entitled to have the problem with the stairway repaired in the manner proposed by Mr. Febbrini.

As for the door, the Applicants have fully proved the existence of a problem. There has been no evidence by the New Home Warranty Program that in any way contradicts their testimony. Under the circumstances, they are entitled to have the door repaired.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claims of the Applicants.

The Tribunal directs the Program to repair the problem with the stairwell by removing the balance of the wall between the winder stairs and the living room to the point where it would be flush with the kitchen, dining room wall. The Program must also provide moveable railing between the risers of the stairs and the living room.

The Tribunal also directs the New Home Warranty Program to carry out the repairs necessary on the front door so that the Applicants no longer have problems opening it during cold weather.

AGNELLO X. FERNANDEZ

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
GORDON R. DRYDEN, Vice-Chairman as Member
LOUIS A. RICE, Member

APPEARANCES:

AGNELLO X. FERNANDEZ, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF 3 August 1990

HEARING: 9 January 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Ontario New Home Warranty Program (the "Program") which determined that the Applicant was entitled to compensation of \$1,978.40 for financial loss resulting from the failure of the builder to perform its contract with the Applicant. As set forth in the Program's letter dated September 29, 1989, the compensation offered by the Program is made up of the sum of \$128.40 in respect of a contract overpayment by the Applicant to the builder, together with the sum of \$1,850.00 representing the Program's estimate of the total cost of repairs of the items which it found were covered by warranty.

The home in question was constructed for the Applicant by Fifth Estate Homes Ltd. pursuant to a contract dated September 8, 1986. The Applicant became the owner of the lot in December, 1986, and construction of the home followed thereafter. The Applicant and his family took possession of the home on or about August 1, 1987.

The following claims were presented by the Applicant to the Tribunal for its review.

1. Claim for credit for vinyl flooring not installed in the main bathroom and entrance hall.

The agreement with the builder called for the

installation of vinyl flooring in, inter alia, the main bathroom and entrance hall. The said agreement also refers to a \$17.00 per square yard allowance for carpet and vinyl. The Applicant testified that he decided to upgrade these two areas to ceramic tile flooring and paid the builder's subcontractor directly for the upgrade. The total area in question was 300 square feet. The Applicant claims that he is entitled to a credit of \$567.00 from the builder in respect of the vinyl that was not installed and that he did not receive any credit for this item.

The evidence before the Tribunal is that the builder gave the homeowner allowances totalling \$3,500.00 for work deleted from the contract. The builder put forward two different and somewhat inconsistent explanations of how he arrived at this amount, however, it is notable that in neither one does the builder purport to include a credit for the vinyl flooring that was not installed in these two areas. The credit is clearly contemplated by the terms of contract with the builder, the builder has failed to give the credit, and has, therefore, failed to perform its obligation under the contract. The Applicant has suffered a financial loss as a result.

Section 14(1) of the Ontario New Home Warranty Plan Act provides:

14(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage

subject to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

The Applicant is entitled to compensation from the Program for this amount, however, this item must be further considered in the context of the overall claim with as to the total amount of the builder's allowance, which claim is dealt with in paragraph 3 below.

2. Claim in respect of builder's failure to install AM-FM wiring for intercom.

The contract called for the contractor to install "Pre wiring for AM-FM intercom, doorbells and telephone." The Applicant testified that he was at the house before the drywall went up and that he observed at that time that the wiring was not there. He brought the omission to the builder's attention. On the Applicant's next attendance at the house the drywall was up, and there had been no openings left near the front door or elsewhere in the house to accommodate installation of the intercom system. The Applicant's has concluded that the wiring was not done by the builder. It is certainly possible that the Applicant has a claim against the builder in respect of this item. However, the Applicant has failed to prove that the claim was made to the Program within the one year warranty period, which he must do in order to claim relief from the Program. The Program maintains, and the Tribunal finds, that the claim was not made in time and, accordingly, the claim is disallowed.

3. Claim that \$3,500.00 builder's allowance insufficient

As indicated at the beginning of these reasons, the Program's decision was, in part, to allow the Applicant the sum of \$128.40 for overpayment on the contract. As set out in the Program's September 29, 1989 letter, the amount of \$128.40 was derived as follows:

The original contract price	178,000.00
Extras to the contract	<u>3,771.40</u>
Total contract price	181,771.40
Builders allowances made to homeowner for work deleted from contract	<u>3,500.00</u>
Revised contract value	<u>178,271.40</u>
Cancelled cheques supporting draws paid on the contract	178,399.80
Overpayment on contract	<u>128.40</u>

The Applicant's position is that he should have received a credit greater than \$3,500.00 from the builder and that therefore his actual overpayment to the builder, and financial loss, is greater than \$128.40, and the Program should compensate him for that greater amount.

Mr. Fernandez testified that the sum of \$3,500.00 is exactly equal to the amount of the final holdback withheld from the builder. The final two payments to the builder were to total \$35,000.00. The 10% holdback on these two final payments was, therefore, \$3,500.00. The Applicant maintains that the builder's list of allowances was drawn up to equal the amount of the holdback, and does not correctly reflect the allowances that the Applicant is entitled to.

As indicated earlier in these reasons, there were in fact two different breakdowns of the \$3,500.00 amount, submitted by the builder. One list was submitted to the Program, while a different list was given to Mr. Fernandez. These two breakdowns are, in part, inconsistent. In particular the list given to Mr. Fernandez indicates a credit of \$320.00 for railing lacquering and \$500.00 for drywall. In the list submitted to the Program, this \$820.00 is stated to be for replacement of a scratched laundry tub, installation of a dryer vent, caulking around a door, installing a cover for opening on the garage ceiling and general clean up for windows. In his evidence on August 3, 1990, Mr. Fernandez claimed that the allowances in respect of the following items:

Credit for vinyl flooring (see paragraph 1 above)	\$ 567.00
Credit for fireplace	\$2,500.00
Credit for outside painting	\$ 630.00

Credit for basement drywall	\$1,050.00
Credit for outside caulking	\$ <u>408.00</u>
Total	<u>\$5,155.00</u>

The Applicant submitted copies of various quotes that he obtained in support of amounts claimed for the last four items listed. Perusal of those estimates reveals that some include work or materials that the Applicant is not entitled to receive credit for. For example, the contract call for the builder to provide a rough-in fireplace in the basement. As it was not provided, the builder allowed a \$500.00 credit for this item on each of the two lists. The \$2,500.00 estimate submitted by Mr. Fernandez includes much more than a fireplace rough-in, it includes installation of two mantels, running electrical hook ups, and finishing front with brick. The Tribunal finds that \$500.00 is a reasonable allowance for a fireplace rough-in. This finding alone reduces the total credit claimed by the Applicant to less than the builder's allowance of \$3,500.00.

On the resumption of the hearing on January 9, 1991, Mr. Fernandez filed a "summary of claim" listing additional credits and providing additional quotes. However the Applicant's entitlement to these further amounts was not clearly supported by the evidence put before the Tribunal. The onus is upon the Applicant to prove his claim on the balance of probabilities. The Tribunal is unable to find on the balance of probabilities that Mr. Fernandez was entitled to builder's allowances in excess of \$3,500.00 and is therefore unable to find that the Applicant suffered a financial loss in excess of \$128.40 due to overpayment to the builder.

4. Main entrance door

The Applicant maintains that the door that was installed by the builder was a used door which had previously been located on the builder's sales trailer. Moreover, the door is missing a collar and weather stripping. The Program has allowed a credit of \$100.00 for the missing collar and weatherstripping; however, Mr. Fernandez maintains that he has been unable to purchase the collar separately on the market as it is sold as a package with the door. The Tribunal directs the Program to supply and install the missing collar and weather stripping in respect of the main entrance door.

5. Basement wall leaks

The Applicant complains of leaks in the south west and south east corners of the basement, and near the electrical panel in the basement. The builder had apparently advised the Program that these had been repaired, however, Mr. Fernandez testified that this was not the case. Mr. Thurston, the Program inspector indicated that he did not inspect this item on his last attendance at the house. The Program is directed to reinspect and to repair any leaks in these locations.

6. Staircase railings not lacquered properly and interior painting poorly done

Having heard the evidence of Mr. Fernandez and Mr. Thurston, the Tribunal is not satisfied on the balance of probabilities that the painting and lacquering was not done to an acceptable standard. As well, there is some evidence that the Applicant may have received a credit from the builder in respect of the lacquering.

7. Opposite curve handle on bathroom

The handle is of the wrong type for this door and makes it awkward to open and close the door. The Tribunal directs the Program to supply and install a handle of the same type but which curves in the proper direction.

8. Plug in centre of washroom wall

The plug's location prevents the homeowner from hanging a mirror over the sink. The Program is directed to relocate the plug.

9. Kitchen ceiling panels not symmetrical

The Tribunal agrees with Mr. Lorne Thurston's view, expressed in the conciliation report, that this is, at most, a cosmetic imperfection that is not covered by the statutory warranties.

10. Switch located behind bedroom door

A person entering this room cannot turn on the light until he or she has entered the room, closed the door, and, presumably located the switch by groping around in the dark. The Tribunal considers this unacceptable. However, unfortunately for Mr. Fernandez, the claim was not made to the Program within the one year warranty period and is, therefore, disallowed.

11. Doors and windows require adjustment

The Tribunal accepts the Applicant's evidence that there are three doors and three windows that do not close or lock properly due to poor alignment of the hardware. This demonstrates poor workmanship and the Tribunal directs the Program to carry out the adjustments needed to allow these doors and windows to function properly.

12. Credit of \$1,850 for repairs of items found to be warranted is inadequate.

The Program arrived at the sum of \$1,850 on the basis of estimates made by Mr. Morley Thurston, with no outside estimates obtained. The Tribunal is unable to conclude that the compensation offered will adequately cover the cost of the warranted items. Accordingly, the Tribunal directs the Program to repair those items referred to in the Program's September 29, 1989 letter as Items 12, 14, and 15 and Items 8, 17, 24 and 25. In addition, the Tribunal directs the Program to repair all of the other warranted items identified in Schedule A(1) of the conciliation report dated September 2, 1988, to the extent that these have not already been repaired by the builder.

In summary, therefore, and by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal orders the Program to pay the Applicant the sum of \$128.40, and to carry out repairs referred to in these reasons.

R.B. FIELD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
RICHARD F. STEPHENSON, Vice-Chairman as Member
LOUIS A. RICE, Member

APPEARANCES:

R.B. FIELD, appearing on his own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 11 October 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from the decision of the Ontario New Home Warranty Program contained in a decision letter dated October 29, 1990. There was only one issue before the Tribunal, that of complaints of defects in the brickwork on the house. This issue was raised in the initial letter of complaint by the Applicant to the Program in the terms "many bricks are chipped and cracked" and was dealt with in the decision letter in a paragraph reading:

We are sorry to advise you that the Warranty Program's position is to accept the explanation in the letter by the manufacturer dated September 25, 1990, that the fine face cracks in the brick are within CSA Standard. Unless we receive more relevant and detailed information, we regret that we cannot be of assistance in this particular matter.

The Applicant was one of two purchasers of the property in question which became municipally known as 393 Callaghan Crescent in Oakville from Mayland Homes (Oakville) Inc. by an Agreement of Purchase and Sale entered into on March 18, 1988. The transaction was closed and a Certificate of Completion and

Possession was completed on June 3, 1988 upon which one defect noted was "brick to be pointed or replaced". The initial letter of complaint referenced above was sent by the Applicant to the Program on May 23, 1989.

Mr. Field was the only witness at the hearing in his own behalf. He presented to the Tribunal a number of photographs of bricks he alleged were defective and all taken from close-up, within a few inches of the walls.

The first of these Exhibits 6A,B,C and D showed hairline cracks in bricks, the next Exhibits 7A,B and C showed chips and flakes of bricks, the next Exhibits 8A,B and C showed cracks slightly wider than the hairline cracks shown in the pictures first mentioned above, the next Exhibits 9A,B,C,D,E and F showed further examples of flaking and chipping of bricks and finally Exhibit 10A,B, and C showed examples of certain repairs made by the Program to which reference will be made hereunder. He said that he counted about 37 defective bricks and he also said that about one-third of the bricks in the back wall of the house were defective and that the situation with regard to the other walls was similar. He said that the number of defective bricks has not increased since the beginning, but the bricks with cracks and chips have continued to deteriorate.

As a result of the request for conciliation, Myrna J. Morris, technical representative of the Program, attended at the premises on September 14, 1989 and completed and mailed her report on October 2, 1989.

Item No. 5 in Schedule "A(1)" dealt with the complaint as follows:

BRICKS ARE CHIPPED AND CRACKED. There is one brick of the east wall of the front door alcove that is cracked and the mortar adjacent to the brick is a noticeably different colour from the existing. The builder is required to remedy the above-noted condition.

The builder has made recent repairs to the chipped and cracked bricks throughout all elevations. These repair efforts are considered acceptable and within the tolerances of acceptable workmanship and materials. It is for this reason that this portion of this complaint cannot be warranted.

Mr. Field responded to this report on this item in the following terms in a letter to the Program dated November 27, 1989:

ITEM 5

BRICKS ARE CHIPPED AND CRACKED:

If you had taken the time to review the CERTIFICATE OF COMPLETION AND POSSESSION you will find this complaint noted. The builder has already acknowledged the problem and repaired a few of the cracked and chipped bricks. The builder had the brick manufacturer inspect the problem and the manufacturer told the builder and ourselves that "these bricks should not have ever been put up in the condition they are in". Did you ever contact the brick manufacturer after we told you about this? If you did not, which seems obvious from your assessment, I suggest you contact the brick manufacturer to confirm their comments. Also only the chipped bricks had had a color touch-up, not a repair, and nothing has been done to repair/replace the cracked bricks contrary to your report. Please reassess this item in light of our comments.

Just as a general side note, I do not understand how anyone can find major chips and bricks which are cracked in half "within normal tolerance of acceptable workmanship". I cannot think of one person, other than yourself, who would find this remotely acceptable. I also cannot accept your theory that water will not enter the cracks in the bricks, freeze in the cold weather, and crack the bricks further or cause other damage in over the long term. I understand a proper repair will be very expensive but the defects in the bricks are not my fault and I should not have to pay the price!

Upon cross-examination at the hearing Mr. Field admitted that, when he was given a copy of the expert opinion obtained by the Program from Brampton Brick Limited, he was urged to get an expert as well to look at this brickwork and make similar tests and

find out whether or not such experts would come to the same conclusion. He did not do this because he said he believed it was the responsibility of the Program and not of him to get an independent expert. He also said that he did not accept the expert opinion from Brampton Brick Limited because "it was biased", that company having supplied the bricks.

Five witnesses were called for the Program, two from the Program itself, two from Brampton Brick Limited and one from the builder being its supervisor of construction. The first of these was Merna J. Morris, the conciliator who wrote the report aforementioned. In speaking of the brick, she said she saw hairline cracks on the face of some bricks which appeared to be caused by the firing of the bricks. She saw only one brick which was cracked right through and warranted that it should be replaced. She saw the chips as minor rather than major. Neither the cracks or chips were visible to her at a distance of 20 feet as specified in the applicable Canadian Standards Association standards. She arranged for Mr. Andy Richters, senior conciliator with the Program, to inspect the home after the first repairs were made in response to her report because these repairs seemed acceptable to her, but the owner was refusing to accept them.

Mr. Richters attended on February 21, 1990 and had the owner point out the worst areas to him. He said that he could not see the cracks and chips at a distance of 10 feet. He said the cracks he saw were normal and normally would cause no problems. He also produced some photographs: three of the front of the house taken at 35 to 40 feet, one from the rear of the house taken at about 20 feet and three of brickwork pointed out to him as defective from about 4 feet (a comparison of these last photographs with those taken by the Applicant showed that the Applicant's photographs were all taken from much closer to the walls than these). In all of the photographs from the front and back, there are no defects visible. In two of the brickwork taken from about 4 feet, no defects are visible and in the third one can be seen a hairline crack. To Mr. Richter's eye, the brickwork was free of warrantable defects and complied with the Ontario Building Code.

The first witness from Brampton Brick Limited was Loren Kruger, its Director of Customer Relations who attended and inspected the bricks in this house in June of 1989. He saw some chipping and arranged for a crew from Brampton Brick to touch-up these areas so they would blend in better. He saw no bricks defective by reason of cracks and said that the brick walls were well done and met the required standards. He denied categorically making the statement attributed to him in the letter of November 27, 1989 from the Applicant to the Program.

The other witness from Brampton Brick Limited was Brad Cobbledick, a graduate engineer employed as a ceramic engineer at that company. The Tribunal ruled that he was qualified as an expert witness at this hearing. He was requested to do certain tests upon these bricks as to their soundness and as to their meeting Canadian Standard Association standards. His results were set out in a letter dated September 11, 1990 to both the Applicant and to the Program, and also to the builder. As well, he discussed the results of these tests in his evidence before the Tribunal.

He had obtained what appeared to be proper samples of these bricks in question and put them through two tests, a freeze/thaw test and a comprehensive strength test. In both cases, the bricks more than met the required standards. These standards allow for a .5% mass loss during the freeze/thaw test and these bricks suffered only a .25% loss. For the comprehensive strength test, the standard is that for 5 bricks, the average must be slightly above 20 mpas with no single brick falling below slightly over 17 mpas. The lowest result of four tests performed by Mr. Cobbledick was 56.7 and the highest was 80.6. Mr. Cobbledick stated that these results showed that the bricks were structurally sound and not prone to spalling or deterioration during freeze/thaw cycling. He looked at the photographs presented earlier, particularly those presented by the Applicant. He said that the cracks in chips he saw would not affect the durability of the wall or the use of the building and this should not be a future problem with them.

A final witness was Ernest Manise, the supervisor of construction of Mayland Homes. He was present at all of the inspections by representatives of the Program including the occasion when the Applicant said that Mr. Kruger was there and criticised the bricks as indicated in his letter. Mr. Manise gave evidence that he heard no such statement made by Mr. Kruger. With the exception of the brick which was cracked and which Ms. Morris had ordered replaced, he saw no cracks or chips of any consequence. The cracks were hairline cracks and the chips were small; none of them larger than a nickel. He found the quality of the brickwork good.

Upon all of this evidence the Tribunal must find, as a fact, whether there are warrantable defects in these bricks as claimed by the Applicant or not. At this hearing, the burden of proof was upon the Applicant to establish his case, therefore, to establish this fact. The conclusion of the Tribunal is that he has failed to do so. Indeed, a substantial preponderance of the evidence establishes that there are not such defects. We have the evidence of five witnesses all experienced to some degree in looking at such brickwork, and the evidence of the photographs

supporting this conclusion. It is corroborated by the testimony of a qualified expert who performed appropriate tests and by the results of those tests. In an attempt to be as fair as possible to the Applicant, the Program arranged extra inspections by its senior conciliator and by persons from Brampton Brick Limited and for tests to be made and an expert opinion of an engineer obtained.

The Tribunal considers it significant that, although invited to do so, the Applicant did not attempt to get an expert opinion or expert evidence to meet the case of the Program. We must find, therefore, upon all of this evidence that the Applicant has not established any breach of warranty under Section 13 of the Ontario New Home Warranties Plan Act.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

DR. J. FITZSIMONS and THERESE MADDEN-FITZSIMONS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN HURLBURT, Member

APPEARANCES: STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

No one appearing for the Applicants

DATE OF HEARING: 13 June 1991 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal determines as follows:

1. The Applicant was sent by registered mail the Appointment for and Notice of Hearing dated the 9th day of May, 1991 as evidenced by Exhibit 2, which stated:

...hearing will be held...before the
Commercial Registration Appeal
Tribunal in the Tribunal's chambers,
1 St. Clair Avenue West, Toronto on
Wednesday, June 12, 1991 at 9:30
o'clock in the forenoon...

which contains the further notice:

...If you do not attend at the
hearing, the Commercial Registration
Appeal Tribunal may proceed in your
absence and you will not be entitled
to any further notice in the
proceedings.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to carry out its Proposal.

584745 ONTARIO LIMITED
(RELIABLE CONSTRUCTION)

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
JOHN CORSI, Member

APPEARANCES:
RICHARD M. VAN BUSKIRK, representing the Applicant
CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATES OF 5, 6, November 1990 Waterloo
HEARING: 4, 5, 22, February 1991
4 March 1991

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar under the New Home Warranties Plan Act to revoke the registration of 584745 Ontario Limited carry on business as Reliable Construction ("Reliable"). Evidence on behalf of the New Home Warranty Program was presented to the Tribunal on November 5 concerning seven homes, all of which are in the City of Kitchener.

Mr. Ken Rose ("Rose") is a conciliator and technical representative with the Program and has been ten years in his position. He presented evidence for three claims, namely, "Brown", "Patai" and "Chonko".

Mr. Lloyd Hagen ("Hagen") is the Assistant Manager of the Kitchener Regional office of the Program with 13 years experience, and had a mechanical contracting business from 1948 to 1977. He was the conciliator for the "Cloet", "Sachse", "Chahal" and "Fischer" claims.

Cross-examination of the witnesses by Mr. Joe Silaschi ("Silaschi"), the principal of Reliable took place on November 6 for the "Brown" claim and by Mr. Richard Van Buskirk, counsel for Reliable on the six other claims on February 4 and 5, 1991. Mr. Silaschi presented his evidence on February 5 and 22; and was cross-examined by counsel for the Program on March 4, 1991.

Silaschi has been a builder in the Kitchener-Waterloo area since 1958, first under a partnership and then through several incorporations. He was involved with some 70 single-family homes or apartment units each year and has also constructed churches, shopping plazas, schools and restaurants. He is the President of 584745 Ontario Limited and the latest Builder's Guide of the Program shows some 87 units built in the past four years under the Reliable name and under the name of "Heritage Homes". He was for two years President and for 14 years a Director of the Kitchener-Waterloo Home Builders Association.

He allowed these seven properties to develop claims to the risk of his revocation as a builder because of the problems he had in 1986-1987 with employees and personally, and because these seven customers were, in his view, unreasonable. He does not dispute every item on the Conciliation Reports, but claims that he tried to solve many items and that the estimates given to do repairs and prices paid by settlements to these customers were extravagant.

Rose outlined Reliable's record of 12 chargeable conciliations of 31 completed properties over the past three years. This is the worst record for a builder in the region and the New Home Warranty Program was seeking revocation of registration and not just payment of the outstanding claims, however they may be recalculated. The total dollar value of the seven claims was set at \$16,808.65 in the Notice of Proposal and that figure included the routine 15% administration charge on each file.

Rose noted that Reliable had been registered with the Program from its inception, and that the incorporation date for 584745 Ontario Limited was May 14, 1984 with Silaschi as the only principal, director and officer. The usual Vendor/Builder Agreement was completed as of June 11, 1984 and the usual guarantee form was completed by Silaschi on July 20, 1984.

The Tribunal will summarize the evidence for each of the seven properties by referring to the final items which made up Work Schedule "B" in each case since the total dollar amount for each formed the cash settlement offer which was then paid to each owner. We will review the evidence and argument for each property and give our conclusion as to what amount, if any, is the builder's responsibility.

'BROWN'

Elizabeth and Greg Brown bought 58 Huntingdale Drive on May 19, 1987 for \$214,000 and took possession on September 25,

1987. Their letter of complaints arrived at the Program on June 13, 1988 and a copy was sent to Reliable on June 20. A conciliation was requested and Rose did this with Silaschi and Mr. Brown present on September 12, 1988.

Sixteen of the original 34 complaints had been attended to, and Rose found 9 items warranted and 9 others not. A reinspection on October 24 led to an added item concerning damage to the chimney being recorded.

An estimate for the outstanding items from a Work Schedule "B" as set out below was obtained from Junker Construction Ltd. in the dollar amounts in the adjoining column.

WORK SCHEDULE "B"

Ref. No. 14-957-30585	Original inspection - September 12, 1988
Owner Mr. and Mrs. G. Brown	RE - Inspection date October 24, 1988
Address 58 Huntingdale Drive	Mailing date December 15, 1988
Kitchener, Ontario	

ITEMS	ITEMIZED COST
(1) FLOORING - Secure basement carpet mid-point near north wall and loose parquet tile in family room immediately north of opening to den. However, gaps between parquet tiles and other floor irregularities may be attributed to normal shrinkage of materials caused by drying after construction and not warrantable.	85.00
(2) INTERIOR DOORS - Adjust basement passage door to operate as intended. However, no excessive movement or fault with bifold handles was noted.	83.00
(3) PLUMBING - Eliminate leakage at shut off valve to garage hose bib. However, no leakage or fault noted below ensuite sink. No fault with powder room exhaust fan. Also, variance in water temperature is not warrantable.	125.00
(4) DOOR BELL - Complete installation of chimes to operate as intended front and back.	129.00
(5) EXTERIOR TRIM - Exchange faulty shutters (three pairs) at east elevation to match as	366.00

close as possible and provide roof weather vane as agreed.

- | | | |
|-----|---|-----------------|
| (6) | BATHROOM TILES - Complete installation near ensuite tub apron at east wall to match as close as possible. However, securing of upper towel bar and alignment of toilet are judged to be within acceptable tolerances and not warrantable. | 235.00 |
| (7) | COMPLETE FRUIT CELLAR ENTRANCE WAY - Finish opening in a good workmanlike manner as required. | 255.00 |
| (8) | CHIMNEY - Correct chimney flashing in a workmanlike manner | 589.00 |
| | | <u>1,867.00</u> |
| | (Install new trim and finish to match) | <u>222.00</u> |
| | | 2,089.00 |

15% administration charge	<u>313.35</u>
	\$2,402.35

In addition to Items 1 to 8 on the Work Schedule, there was also included an item for \$222 to install new trim and finish to match which was not on Work Schedule "B" originally. In addition, a basement leak required repair in the amount of \$345. The builder was not separately invoiced for that item, but there was no objection to having it included in the eventual total if warranted.

Reliable was informed on December 9, 1988 that "the Warranty Program is now undertaking to fulfil your Warranty obligations."

There was a cash settlement paid to Mr. and Mrs. Brown of \$2,089.00 and Reliable was invoiced on January 30, 1989 for that amount plus \$313.35 as a 15% administration charge; a total of \$2,402.35.

In cross-examination by Silaschi, Rose stated that if a builder is dissatisfied with an item such as the shutter replacement, then the builder should speak up at the conciliation which Silaschi did not do. In addition, there is the opportunity to complain about an item and the procedure for that is set out in the accompanying letter which sends a copy of the Conciliation Report to the builder. Rose agreed that individual items may be priced much higher than a builder could provide, but a year had

gone by and the builder had not satisfied the homeowner.

Silaschi stated that he had given instructions for the carpet to be attended to and had looked after the loose tiles and squeaking tread himself. A breakdown of the \$2,089 was sought without reply from the New Home Warranty Program and various letters seeking details were not replied to.

Silaschi said that Brown knew where to acquire matching tiles, but would not tell him and Silaschi could not find such tiles from his suppliers since a year had gone by and certain colours are not all continued. The price for a plumbing service call should be \$35 and not the \$125 which Junker had estimated. In his view, the door bell and shutter claims were invalid, and were of extravagant cost.

Silaschi agreed on cross-examination that he had not objected to the Conciliation Report items and that a reinspection was likely before any Work Schedule would be issued by the Program.

The Tribunal concludes that the added cost for the installation of new trim cannot be accepted, but that the other items on the Work Schedule and the foundation leak item are valid and that the Program has supported by an estimate the amounts paid for those items. We set the total for this claim to be \$1,867.00 plus \$345.00, plus a 15% administration fee of \$331.80; for a total \$2,543.80.

'PATAI'

Rafael and Gabriela Patai took possession of 46 Huntingdale Drive on January 22, 1988 and sent in a letter of 35 complaints on February 25. The letter was sent on to Reliable and a request for conciliation was accompanied by a 10-page Architect's report.

Rose did the conciliation on August 11, 1988 with Mr. and Mrs. Patai and Silaschi present. Four items were found to be warranted and 9 were not. The Conciliation Report was sent to Reliable and no objection was made by Silaschi either at the conciliation or to the items in the report when sent to Reliable.

On reinspection, the four items had not been completed and a Work Schedule "B" was prepared with costs as estimated by Junker Construction Ltd. as follows:

WORK SCHEDULE "B"

Ref. No. 14-957-31337 RE - Inspection date October 24, 1988
 Owner Mr. Rafael Patai Mailing date January 26, 1989
 Address 46 Huntingdale Drive
 Kitchener, Ontario

ITEMS	ITEMIZED COST
CONTRACTUAL ITEMS:	915.00
Install bifold doors with hardware.	
Finish affected areas to match as close as possible.	
Finish deck railing to match existing.	
Front Door - Refit and rework entrance door as required.	125.00
Paint - Apply surface coatings to windows and trim at affected areas to match as close as possible.	1,325.00
Flashings - Repair faulty roof flashings at chimney, rear bay and above lower roof abutting brick veneer in a good workmanlike manner. Remove excess debris from roof shingles near chimney.	1,578.00
	<u>3,943.00</u>
15% administration charge	<u>591.45</u>
	\$4,534.45

A cash settlement was made to Mr. and Mrs. Patai for \$3,943 and Reliable was invoiced for that amount plus 15% administration charge of \$591.45; for a total of \$4,534.45. On cross-examination, Rose stated that even if the owners were going to extend their deck, it was not workmanlike to close off a ten foot drop at one end with just two cross pieces spiked into the wall. In his view, a builder leaves himself open to expensive penalties if nothing or little is done after a conciliation when likely a year or more will have gone by since possession by the new homebuyers.

Silaschi explained that bifold doors were not installed since Patai owed him money for heat and hydro costs for a new home they occupied while waiting for their home to be completed. They had also wanted moving costs to be paid but Silaschi refused and, in addition, no rent had been charged to them.

Access was denied to Silaschi so that the front door refit was delayed but was thought to be completed until the invoice arrived. The painting charges for fifteen casement windows and four doors is excessive for Silaschi to accept. In his view, \$150 would be quite enough; but Mrs. Patai sent his painter away and said that they would do the window trim themselves.

Silaschi does not agree with the flashing problem since Patai wanted it done as it now is, and there have been no leaks or the Patais would have complained. He is at a loss as to what to do to satisfy the complaint. In the event, the work was not done and a cash settlement was made so he will never know what the problem may be. On cross-examination, Silaschi acknowledged the complaint, the Conciliation Report, the reinspection and the notice that the Warranty Program will act, but stated that any necessary work had been done and that no leaks in four years supported his assertion.

The Tribunal accepts the Program's evidence for these items except for the estimate to paint the window edges which we find excessive. That item is reduced by \$400.00. Accordingly, the total allowed is \$3,543.00 with a 15% administration charge of \$531.45; for a total of \$4,074.45.

"CHONKO"

Edward and Linda Chonko bought 139 Brierdale Drive in October, 1987, and sent in a complaint letter to the Program on June 10, 1988. As usual a copy of their letter was sent to the builder to have warranted items remedied. A further letter with 22 complaints was sent on October 14 to Reliable and after a meeting, Silaschi attended to some items. Rose did a conciliation inspection on December 12 when eight items were found to be warranted and four went not. The usual letter was sent to Reliable with a copy of the Report and repairs were to begin within 14 days and be completed within 30 days.

No objection was made by Reliable to the Report, and certain items were repaired. Further nail pops and visible tape seams were also complained about at a reinspection on February 24.

A Work Schedule "B" was prepared with estimate costs calculated by Rose on the basis of his forty years of building experience as follows:

WORK SCHEDULE "B"

Ref. No. 14-957-30583	Inspection date	April 28, 1989
Owner Mr. and Mrs. E. Chonko	Mailing date	May 5, 1989
Address 139 Brierdale Drive		
Kitchener, Ontario		
N2A 3S8		

ITEMS	ITEMIZED COST
1. KITCHEN CABINETS: Replace 2 sets of upper cabinet doors that vary by 1 1/2 inches with doors of equal size that match in finish as close as possible. Adequately, support microwave shelf in a good workmanlike manner.	500.00
2. DRYER VENT: Provide ventilating duct with cover as specified in the Certificate of Completion and Possession.	200.00
3. BATHROOM SINK: Replace faulty sink to match as close as possible. Use existing plumbing fixtures.	200.00
4. CASING SPLIT: Replace faulty materials near top corners of bathroom door and south bedroom window frames. Finish to match as close as possible.	150.00
5. CRACKS IN BRICK VENEER: Suitable tack-point the step cracks at mortar joints where necessary and replace faulty brick at south elevation near westerly basement window to match as close as possible.	250.00
	<u>1,300.00</u>
15% administration charge	<u>195.00</u>
	\$1,495.00

Rose observed that the mismatch of cabinet doors and the microwave shelf repairs were not satisfactory as being good and workmanlike. While a hole was cut for a dryer vent, the outside cap was not provided. This is a minor item and the space can not be left open. The complaints about the bathroom sink and the small split in the window casing were made by the owners and Rose agreed from his experience that they should be attended to. Repairs to step cracks in mortar and the replacement of one cracked brick were also required by Rose.

On cross-examination, Rose agreed that the homeowners request for equal cupboard doors is a workmanship issue which goes to appearance, just as is the matter of the microwave shelf repairs. Replacement of the sink would have been less expensive if the builder had done so, and the allowance for the casing split repair, while generous, is based on the possibility of complete replacement.

In Silaschi's view, the possible amounts for each of these items if found to be warranted, should be \$170, \$30, \$110, \$150 and \$250 for a total of \$710. He believes that Rose's estimates are far too generous. However on cross-examination, he agreed that he had made no comment on these matters at the conciliation, did not respond to the Conciliation Report and did not seek a breakdown of amounts as billed in total to Reliable.

The Tribunal accepts the evidence as to the valuations for each of the items as calculated by Rose; noting that the builder could well have attended to them at much less cost but did not do so.

"CLOET"

Possession of this home at 51 Brierdale Drive was taken by August and Assunta Cloet on May 8, 1987. A complaint letter with 44 items was received by the Program on September 10 and a copy was sent to the Builder for action as appropriate. A letter with other concerns was received, and a copy was again forwarded to Reliable. A conciliation was sought for 27 items and for 5 further items on a City Building Inspector's list.

Hagen did the conciliation inspection on March 11, 1988 and found 10 warranted items. Silaschi was present. The Conciliation Report was sent to Reliable with a notice to begin work in 14 days and have it completed in 45 days. There was no response to this letter by Reliable, nor was there any complaint as to the contents in the Conciliation Report. The front porch concrete slab had been ground down but not in a good workmanlike fashion, said Hagen.

On May 11, Hagen returned to review the matter of the water leak and discussed that item further with Silaschi. A reinspection on June 1 and a second reinspection, led to the preparation of a Work Schedule "B" on October 18, with outstanding items, and a list of costs based on two estimates for parts of the needed work. The items and valuations set were:

WORK SCHEDULE "B"

Ref. No. 14-957-26761 RE - Inspection date October 18, 1988
 Owner Mr. and Mrs. A. Cloet Mailing date January 26, 1989
 Address 51 Brierdale Drive
 Kitchener, Ontario

ITEMS	ITEMIZED COST
Rebuild in a workmanlike manner the block wall behind the stairs to the lower basement level.	580.00
Rebuild the retaining wall and steps at the rear basement walkout. Provide a proper base and floor and handrail to meet Ontario Building Code requirements.	1,955.00
Remove, replace electric meter and base and reinstall level and plumb and secure to exterior wall.	150.00
Refinish the front porch with a smooth acceptable surface with adequate slope so water will not stand in puddles or drain towards the house.	695.00
Locate source of water leakage into basement at lower washroom and stop water entry into the basement.	350.00
Build and install new wooden steps into basement.	415.00
Contingency	300.00
	<u>4,445.00</u>
15% administration charge	<u>666.75</u>
	\$5,111.75

By then, seventeen months had gone by since possession, and a contingency item of \$300 had been added in as the owner would have to deal with two or more contractors if the work proceeded after the expected cash settlement was paid.

A cash settlement in the total amount of \$4,445 was made and on February 16, 1989, Reliable was sent an invoice for that amount plus the 15% administration charge of \$666.75; for a total of \$5,111.75. Hagen noted that eighteen months had gone by since the letter of complaint and a year had passed since the conciliation inspection.

In cross-examination, Hagen reviewed the basement stairs inadequacies and the walk out problems of tread width. In his view, the whole stair could well be redone and not have it extend beyond the foundation with proper higher risers, shorter treads and no hand rail extension. The porch slab surface after being ground down was "just a lousy job" in his view, and good workmanship required a new cap to be poured.

Silaschi gave evidence that he had offered to refund the deposit and cancel this transaction since he could not satisfy the Cloets or her father-in-law who is a builder in Toronto. But the transaction did close and he tried to deal with the outstanding items. He reviewed appropriate costs in his opinion and found the amounts allowed by the Program for each of the items to be excessive. The rebuilding of the stairwell would have made the area one foot wider so the amount of that estimate was challenged by Silaschi. He noted that upon the cash settlement being made, no work was done on the walkout which remains with its stairs and handrail, the same now as when installed.

In cross-examination, he accepted that the documents of the Program in this file corroborate in sequence the complaints, the conciliation, the reinspection and the estimators' view of the work to be done.

After reviewing the evidence, the Tribunal concludes that the allowance for the rebuilding of the basement walkout was excessive and we set the builder's obligation there to be \$1,200. Also the water leak allowance of \$350 is cut to \$125 and the contingency amount of \$300 is not allowed.

The total of warranted work is, therefore, set at \$3,165.00 plus a 15% administration charge of \$474.75; for a total of \$3,639.75.

"SACHSE"

Gerharg and Elizabeth Sachse bought 47 Brierdale in early 1987 and sent in a letter of their complaints on August 11, a copy of which went to Reliable in the usual manner.

A conciliation was done by Hagen on January 11, 1988 with 4 items found to be warranted. Silaschi was present and later attended to one item; and eventually a Work Schedule "B" was prepared as follows with dollar amounts added from an estimate made by Junker Construction Ltd.

WORK SCHEDULE "B"

Ref. No. 14-957-26762	RE - Inspection date	October 18, 1988
Owner Mr. and Mrs. G. Sachse	Mailing date	January 26, 1989
Address 47 Brierdale Drive		
Kitchener, Ontario		

ITEMS	ITEMIZED COST
(1) Remove and replace precast window sill at rear bedroom window.	165.00
(2) Clean up, reseal and caulk lower family room window, clean out with holes.	75.00
(3) Refinish the front porch slab with a smooth acceptable finish and surface. Ensure it has adequate slope so water will not stand in puddles or drain towards or leak into the house.	695.00
	935.00
15% administration charge	140.25
	\$1,075.25

A cash settlement was made and the total including the 15% administration fee was billed to Reliable on February 22, 1989 in the amount of \$1,075.25.

In Hagen's view, a window sill in three unequal pieces is not workmanlike and the decision to replace was to favour the owner's complaint. Repairs to a window, and the same porch slab problem as was discussed in Cloet were reviewed by Hagen.

In cross-examination, Hagen noted that on reinspection, the owner continued the complaints of window leakage and the porch slab concern. The window sill had not been repaired.

Again, Silaschi stated that the porch slab repair estimate was excessive. In his view, the window sill was sloped and mortared and did not need to be in one or equal length pieces.

The Tribunal finds that the three items totalling \$935 are properly charged to the builder. The prices assessed are based on an estimate and the total amount recoverable is \$935 plus the 15% administration charge of \$140.25 for a total of \$1,075.25.

'CHAHAL'

Armit and Josephine Chahal bought 115 Gray Street and completed the Certificate of Completion and Possession as of January 13, 1987. Their letter of complaints was received by the Program on September 21 and there was also a letter from the Kitchener Building inspector with ten items to be completed. Copies of both of these letters were sent on to Reliable.

A conciliation occurred on November 30 conducted by Hagen with Silaschi present. Eleven items were found to be warranted. A broken chimney cap was reused in repairs and a further complaint was made of a basement water leak.

The outstanding uncompleted items were eventually put on a Work Schedule "B" and Junker Construction Ltd. prepared an estimate for the work to be done in the amounts in the column as set out below.

WORK SCHEDULE "B"

Ref. No. 14-957-26758	RE - Inspection date	October 18, 1988
Owner Mr. and Mrs. A. Chahal	Mailing date	January 26, 1989
Address 115 Gray Street		
Kitchener, Ontario		

ITEMS	ITEMIZED COST
(1) Replace chimney cap in workmanlike manner	128.00
(2) Clean all mortar from surface of bricks on the front and side of garage.	475.00
(3) Alter aluminum trim along front of house and along garage wall to close gap between brick and siding	135.00
(4) Extend and alter as required both interior and exterior so sump pump discharge is to swale or drain in accordance with the requirements of the Ontario Building Code subsection 9.14.5.2	269.00
(5) Install new weather seal at side door to prevent the entry of water into the house.	96.00
(6) Reshingle around chimney reflash where necessary	

	replace shingles on side edge of garage and caulk at upper split level (2 sides).	221.00
(7)	Remove reseal and reset toilet.	<u>115.00</u>

	TOTAL ESTIMATE	<u>1,439.00</u>
	15% administration charge	<u>215.85</u>
		1,654.85

The seventh item to remove, reseal and reset a toilet did not appear on the original Conciliation Report as a warranted item. Again a registered letter informed Reliable that the Program would proceed and cash settlement occurred. On February 22, 1989, Reliable was invoiced for the amount plus 15% administration charge of \$215.85 for a total of \$1,654.85.

Hagen reviewed photographs of each outstanding item and explained the quotation eventually received from Junker Construction Ltd.

Silaschi objected to the toilet item which was held initially to be unwarranted, but which was included in the Work Schedule "B". He stated that the sump pump outlet had been attended to but that the owner improperly changed the grade and covered the hose. The developer will not release a damage deposit of \$2,000 to Reliable for this lot even though he said the City of Kitchener inspector agrees with his view.

The costs and necessity of each repair were challenged by Silaschi, but he could not present any sign-off or receipt that items had been attended to. Silaschi expected the Program to inform him of the Work Schedule "B" items and cost estimate so that he could have a final chance to repair items.

On reviewing the evidence, the Tribunal must accept the Program's list of outstanding items and estimates for their repair except for the toilet item which we disallow. The total for the list will accordingly be \$1,324.00 with a 15% administration fee of \$198.60; for a total of \$1,522.60.

'FISCHER'

David and Marilyn Fischer took possession of their new home at 51 Oldfield Drive, on April 30, 1987. Their letter of June 22 with complaints was received by the Program and Hagen attended to the various steps of conciliation beginning with the report of

November 25 at which event Silaschi was present. The one outstanding warranted item was the railing on the front steps and porch which was in two unmatched pieces joined by a sloping connecting piece. Letters of complaint about the appearance of this item were sent in on February 12, March 29, May 15, July 15, and August 28, 1988.

Hagen issued a Work Schedule "B" on October 18, 1988 based on a Junker Construction Ltd. estimate of \$435 to replace and install a new wrought iron railing. A cash settlement in that amount was accepted by the Fischers on December 21, 1988, and Reliable was invoiced on January 12, 1989 for \$435 plus an administration charge of \$100 for a total of \$535.

Hagen explained the difference in height between the 32" sloping side rail of the steps and the 42" porch guard railing. The 12" gap between them was joined by a sloping welded piece of iron railing.

Silaschi stated that the railing had been removed and put back. Then this was done again with certain repairs, but Fischer was not content so the entire railing was replaced. The cost of this item, in his view, should be less than \$250. Upon considering the evidence, the Tribunal agrees that it is the responsibility of the builder to pay for the replacement of the wrought iron railing to the satisfaction of the homeowner and we agree with the assessment of the value of the necessary replacement in the amount of \$535 as invoiced to the builder.

Counsel for the Program reminded the Tribunal that revocation of this builder's registration was being sought in the Proposal of July 26, 1989, due to the breaches of warranty for these seven homes and due to the breaches of terms and conditions of registration. He noted that some items were attended to and that not every complaint was warranted so that the Program is always trying to be even handed between the owner and the builder. The builder brought no evidence of sign-off or office notes as to the items he claimed had been attended to.

For the Program, the conciliation inspector also did the reinspections and obtained estimates for outstanding items in all cases but one.

None of the variety of complaints was major or complicated and adequate time to repair was given and often extended. The extensive delays led to much stress and \$17,000 of items have been outstanding for up to four years. Reliable has required the Program to do the necessary after-sales service and has the worst record in Western Ontario.

While counsel would prefer revocation, he saw an alternative in immediate payment of the amounts found owing for the seven claims together with cash or a letter of credit on deposit with the Program of \$5,000 for each unit under construction to be held for two years from any date of possession and the funds to be available to the Program to call upon them as may be necessary.

Counsel for the builder reminded the Tribunal that his client has sought to come here in order to challenge the decisions of inspectors and the extravagant cash settlements which have been paid. The conciliation fees for the various files have all been paid by the builder.

While none of the items is large or costly, Reliable sees some items as unwarranted and some as too high. In his view, revocation is an unnecessary harsh penalty. Silaschi is not running away and has some complaints as well which have been brought before the Tribunal.

The pattern of this whole hearing has been to have the builder ignore or avoid complaints for many months, then go through a conciliation inspection without complaint either then or upon receipt of the Conciliation Report. Half hearted or no attempts are made to do repairs and upon receipt of a letter advising that the Program will now act, there is rarely a response. Then when an invoice appears, the builder is concerned about the total figure and seeks a breakdown of accounts which he then questions as being extravagant.

When a subcontractor has to come to do small repair items, the cost is understandably higher than the builder could have done the work for in the first place. Indeed often a builder could get a subtrade to go back and fix an item without charge. But that was not done by this builder. Reliable's records were very mixed up as to whether items were done or not and any completed items were not signed off a Conciliation Report which would be the usual good practice. Time and again Silaschi said that he had done repairs but showed no proof or signature in support of his claim. If nothing further was done, Silaschi presumed the work had been done and that clients were accordingly content. However, that was usually not the case.

In cash settlements, we know that often the homeowners will not have the work as complained of done. A home may well be passed on to another buyer with continuing deficiencies which may not be known to the new buyer. Unfortunately, we have no control over such practices.

In these seven homes, the Program has by direct evidence and estimates, generally justified the amounts paid to the homeowners.

The Tribunal has concluded that revocation of Reliable's registration is too severe a penalty considering all of the evidence presented to us.

Accordingly, by virtue of the authority vested in it by Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal orders:

- a) That the Registrar refrain from carrying out at this time his Proposal to revoke the registration of 584745 Ontario Limited carrying on business as Reliable Construction ("Reliable").
- b) That Reliable pay within 20 days to the Ontario New Home Warranty Program the sum of \$14,885.85 (see attached table) being the total amount for the seven claims herein as found by the Tribunal to be Reliable's obligation.
- c) That Reliable deposit with the Ontario New Home Warranty Program the sum of \$3,000 for each of the four homes recently sold, the same for each of the three present homes under construction and the same for each future home upon enrolment of the same in the Plan; which sums are to be held in a separate interest bearing account by the Program for two years from the date of the Certificate of Completion and Possession for each aforesaid property and the Program may draw against those funds for any necessary completion of warranted items; **and** if Reliable fails to abide by the terms of this part, the registration of Reliable may be revoked forthwith by the Program without any further notice.

#14-957-30585 'BROWN':

(1,867.00 + \$345.00)

2,212.00 + 15% administration fee \$331.80 = \$2,543.80

#14-957-31337 'PATAI':

3,543.00 + 15% administration fee \$531.45 = \$4,074.45

#14-957-30853 'CHONKO':

1,300.00 + 15% administration fee \$195.00 = \$1,495.00

#14-957-26761 'CLOET':

3,165.00 + 15% administration fee \$474.75 = \$3,639.75

#14-957-26761 'SACHSE':

935.00 + 15% administration fee \$140.25 = \$1,075.25

14-957-26758 'CHAHAL':

1,324.00 + 15% administration fee \$198.60 = \$1,522.60

14-957-26758 'FISCHER':

435.00 + 15% administration fee \$100.00 = \$ 535.00

\$14,885.85

EDWARD M. FROMM AND JANET CASSAR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
LOUIS A. RICE, Member

APPEARANCES:

EDWARD FROMM AND JANET CASSAR,
appearing on their own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 18 February 1991

Toronto

REASONS FOR DECISION AND ORDER

At the commencement of the proceedings, counsel for the Program identified the fact that some \$53,000 had been paid out in work or settlement to the claimants. Under the provisions of Section 6(3) of the Regulations, this would appear to preclude any further claim as that clause limits the maximum amount payable to an owner in respect of warranty coverage to \$50,000. But under Section 23(2) of the Act, it is provided that the Ontario New Home Warranty Corporation may make by-laws which have the force of Regulations. Counsel for the Program informed the Tribunal that the Program had enacted a by-law effective August 1, 1989 which increased the Program's limit of liability to \$100,000. After consideration of the claim in this matter, the Program acknowledged that the claim by Mr. Fromm and Ms. Cassar was effectively given to the Program by letter dated December 31, 1989 and that accordingly the matters in issue are to be accepted as being within the \$100,000 limit and not \$50,000.

The three items in issue are as follows:

1. A ceramic tile flooring as an upgraded item had been installed in the kitchen and eating area, and there was a sag in the floor from the walls to the centre area of some 1 to 1 1/2 inches;

2. there were questions concerning whether the three bathtubs and enclosures should have doors installed; and
3. there was a question of whether the zero clearance fireplace installed in the dining room was a substitution under Section 21 of the Regulations for a masonry fireplace as called for under the Agreement of Purchase and Sale.

With respect to the ceramic tile floor in the kitchen and eating area, the investigator from the Program acknowledged clearly that there was a visible dip in the floor and that if installed by the builder pursuant to the Agreement of Purchase and Sale, the floor was a warranted item and it would be the Program's responsibility to correct such flooring.

The evidence before the Tribunal indicated that the owner requested an upgrade from vinyl tile to ceramic tile, was given a credit for such by the builder, the homeowner picking up the additional cost of the ceramic tile and paying the installer for additional installation over and above that required under the Agreement of Purchase and Sale. The evidence before the Tribunal identified the installer as the subcontractor for the builder, and that the subcontractor had been engaged to install additional ceramic tile for the homeowner. The Tribunal is satisfied, however, that on the evidence, the installer was, in fact, the builder's subcontractor and not a contractor for the homeowner and, therefore, the faulty installation is warranted and must be corrected by the Program on behalf of the builder.

It was submitted on behalf of the Program that rectification would be much more costly because of the change made by the homeowner from vinyl tile to ceramic tile and that, therefore, the owner should bear some responsibility for the cost of rectification.

The Tribunal does not accept this argument. Counsel for the Program acknowledged that if the Agreement of Purchase and Sale had called for ceramic tile to be installed, then clearly the builder would have been responsible for properly installing such ceramic tile and in default, the Program would have been liable. While it is true, the contractual documentation in this case is not as satisfactory as might be desired; nevertheless, the Tribunal was impressed with the evidence of Mr. Fromm and notes that he was given credit on the Statement of Adjustments and therefore finds that this was in fact a contractual upgrade for which the builder is liable, and by extension the Program.

With respect to the bathroom enclosures, the Applicant made reference to page 2 of the Schedule attached to the Agreement of Purchase and Sale. This provided as follows:

Bathrooms to include full height bathtub enclosures, where separate shower stall not applicable.

Evidence before the Tribunal indicated that the three bathrooms to which this clause referred were surrounded on three sides by wall and that the walls were covered with ceramic tile from the top of the bathtub to the ceiling of the bathroom on these three sides. The claimants submitted that "full height bathtub enclosures" included glass doors on the open side of the enclosure. The problem with this submission is the use of the words "full height" because Mr. Fromm indicated that he did not expect the glass doors to go right to the ceiling, but simply to the top of the showerhead. His witness clearly indicated that though shower doors would go that high, they are usually about 5' in height. She further testified that she would have expected doors to have been clearly specified in the Agreement of Purchase and Sale. In view of this evidence and bearing in mind that the burden of proof is on the claimant, the Tribunal is unable to determine what, if anything, was to be on the open side of the bathtubs in the three bathrooms to which this specification applies.

With respect to the fireplace, evidence showed that in the specifications contained in the Agreement of Purchase and Sale, there was to be installed "wood burning masonry fireplace in family room". The evidence was that the family room because of use became the dining room, but there was no doubt that the fireplace was the one referred to in the Agreement of Purchase and Sale. Further evidence was given that, in fact, a masonry fireplace was not constructed and a zero clearance fireplace was installed. The claimants argued that this was a substitution not authorized by the purchaser and which was not of equal or better quality as required under Section 21 of the Regulations. It is to be noted that no complaint with respect to this fireplace was recorded in the Certificate of Completion and Possession, and it also is noted that the homeowner produced a marble frontage surmounted by a wooden mantle to fit the opening of the fireplace.

Evidence was also given that the homeowner installed glass doors on the fire box, which glass doors were of a type specifically designed for that type of zero clearance fireplace. The claimants indicated that they simply did so in order to have a finished room, but that they did not accept the substituted fireplace. The major complaint appears to have arisen, however,

subsequently because the claimant found that the fireplace did not draw in a manner which the claimant had expected. Evidence of the claimant was to the effect that it was necessary to preheat the interior of the fireplace in order to make the fireplace draw effectively.

Further evidence was submitted that the fireplace in the basement family room was also a zero clearance fireplace, but such had been an extra which specifically was identified in the Agreement of Purchase and Sale. Both fireplaces utilize the same chimney.

With respect to the fireplace in the dining room, evidence by the claimant's expert, was that the cost of constructing a masonry fireplace would be considerably greater than that of installing a prefabricated zero clearance fireplace box and piping. There is no question that considerably more labour would be involved in the construction of a masonry fireplace, which would therefore make it more costly. No clear evidence was submitted to the Tribunal that a masonry fireplace was of substantially better quality than a zero clearance fireplace.

The witness for the claimants testified that zero clearance fireplaces were not necessarily less satisfactory than masonry constructed fireplaces. Again the burden of proof to show that the fireplace installed in the dining room was not of equal or better quality falls upon the claimants, and it is the opinion of this Tribunal that that onus has not been satisfied by the claimants.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal hereby confirms the decision of the Ontario New Home Warranty Program with respect to the fireplace and the tub enclosures. The Tribunal disallows the decision of the Program with respect to the ceramic tile and flooring in the kitchen and eating area and directs the Program to rectify such installation within the limits of liability acknowledged by the Program.

PAMELA AND DONALD GAHWILER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
JAMES GRAY LESLIE, Vice-Chairman as Member
JOHN HURLBURT, Member

APPEARANCES:
NILS PETERSON, representing the Applicants

STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 6 May 1991 Toronto

REASONS FOR DECISION AND ORDER

This matter requires a determination as to whether coverage is available to the homeowners Mr. and Mrs. Gahwiler under the Ontario New Home Warranties Plan Act. The Program acknowledged that there were numerous deficiencies, some of which would be warrantable if in fact the Applicant's home is covered under the provisions of the Act. The decision of the Program rendered November 14, 1990 was as follows:

Given the information at hand it is impossible for the Program to provide a warranty as there is conflicting information as to the status of the home at the time of purchase. The vendor states they did in fact, use the premises as a vacation property while other information contradicts.

We have confirmed the zoning for the house was seasonal and this was changed by your real estate agent at the time of closing.

The facts adduced in evidence before the Tribunal are as follows. Mr. Leslie Gerna, the vendor, had purchased a vacant lot in Orillia Township and obtained a Building Permit on November 2, 1983. The evidence indicated that there were a number of

inspections and construction continued at a very slow pace throughout a number of years. Mr. Gerna indicated that he intended to build the house as a cottage and a future retirement home. He also indicated that building homes was his hobby. He previously had built a cottage in Washago which he had sold, a property in Etobicoke in which he lived and then sold, and a property in King Township which he sold.

He also indicated that his intention altered between 1983 and 1987 when he decided that he would sell the home and this was reinforced by a serious bout in hospital in 1988. Evidence given by the vendor's real estate agent, who held the listing of the property from July 28, 1989 until its sale, was that the home during that period of time appeared to be un-lived in and, in fact, there was some question as to whether water had been connected.

In any event, the Gahwilers entered into an Agreement of Purchase and Sale on November 13, 1989 which transaction closed on February 2, 1990. At the time of the listing and at the time of the sale, the property was zoned SR2 which is a seasonal recreational zoning. Subsequent to the closing, the purchaser's solicitor applied to the Municipality for a change in the zoning which was granted on March 13, 1990.

The evidence of Mrs. Gahwiler was clearly and forthrightly given. She indicated that the broadloom throughout the house was new and covered with cardboard to protect it from wear. She also indicated that the walls were unpainted and that all of the characteristics of an unoccupied house were in existence. She indicated that there was no marking on the floor in the kitchen to indicate any appliances had ever been installed and, in fact, this was confirmed by Mr. Gerna in his evidence.

Clause 1(d) of the Act defines home in a sufficient fashion to cover this home subject to the exception "but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes" (emphasis added). It is to be noted that there are two tests to determine a seasonal residence: the purpose for which it is built and the purpose for which it is sold. By the evidence of Mr. Gerna, the house was built for a seasonal purpose at least in part.

The Program witness indicated, however, that the residence in question had all of the solid attributes of a permanent residence and, in fact, counsel for the Program conceded that the Program, notwithstanding the decision issued in its letter of November 14, 1990 was acknowledging this residence to be a "home" within the definition contained in Section 1 of the Act. Had the Program not so conceded this issue, the Tribunal might have

been inclined to find that at the date of sale February 2, 1990, the zoning was for that of a seasonal residence even though it subsequently was altered. The Tribunal, however, because of the concession of the Program need not address that issue in this case.

The only issue, therefore, remaining is whether Gerna was a vendor under clause 1(n) of the Act which makes reference to the sale of "a home not previously occupied... (emphasis added)". The whole issue, therefore, to be determined by the Tribunal was whether Mr. and Mrs. Gerna occupied the residence prior to the sale to Mr. and Mrs. Gahwiler.

The evidence of Mr. Gerna was carefully considered by the Tribunal. He testified that he set on the site a trailer in the nature of a mobile home, that the trailer had a refrigerator and stove and air conditioning, and all of the comforts normally associated with a mobile home. Mr. Gerna indicated that he used that trailer over the years in which he was constructing the residence. He attended at the site on week-ends and during his holidays for the purpose of constructing the house. He also indicated that he moved the trailer off the lot in 1988 to a location two lots away, and moved some furniture into the house. This furniture consisted of a few chairs and table in the kitchen, a hot plate in the kitchen and two beds and mattresses. He also testified that he removed these items from the house in 1989, and that on occasion when he attended at the site, he used a sleeping bag and continued the construction.

The Tribunal had the benefit of the evidence of both Mr. Christmann, the vendor's real estate agent as to the vacancy of the house and the evidence of Mrs. Gahwiler. The chief building official for the Township of Orillia also indicated when he went to inspect the property on November 22, 1989, that there were five deficiencies in respect to the residence which were of a major nature and which would have prohibited the property from being used as a residence. He also indicated that he saw a couple of dents in the carpeting in the living room which may have been made by some furniture. This furniture, however, was not there at the time of his inspection on November 22, 1989. Subsequently, he indicated that an inspection in January of 1990 satisfied the building department that the residence could be occupied for residential purposes.

Further evidence was presented to the Tribunal that in 1990, the property was reassessed from vacant land with a building under construction to that of completed residential premises. Mr. Gerna in his evidence also indicated that his wife very seldom came to the site and that when he attended at the site, he was working on the house construction.

On the facts, therefore, the Tribunal finds that, notwithstanding any initial intention of Mr. Gerna to make the house both a seasonal residence and ultimately a retirement home, the fact that only a few pieces of furniture were ever placed in the premises, no refrigeration or cooking facilities were ever installed and the use by Mr. Gerna was as consistent with accommodating his construction as to using the property as a recreational residence, the degree of occupation by Mr. and Mrs. Gerna was so slight as not to constitute this house a previously occupied home prior to the sale to Mr. and Mrs. Gahwiler. The Tribunal, therefore, determines that Mr. and Mrs. Gerna were vendors under the definition contained in the Act and the warranty contained in Section 13 therefore in favour of Mr. and Mrs. Gahwiler is in effect.

Pursuant to the authority vested in the Tribunal under the Ontario New Home Warranties Plan Act therefore, the Tribunal declares that Pamela and Donald Gahwiler are entitled to claim against the Program in respect to the warranty of the vendor under Section 13 of the Act and directs the Program to determine what items claimed by Mr. and Mrs. Gahwiler are covered under the warranty set out under the Ontario New Home Warranties Plan Act.

MR. AND MRS. JOHN GAMBLE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
LUCIENNE BUSHNELL, Member
JOHN CORSI, Member

APPEARANCES:
JOHN R. RUDOLPH, representing the Applicants

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 26 July 1991 Ottawa

REASONS FOR DECISION AND ORDER

John and Cathy Gamble were living in Oshawa in a semi-detached home. They wanted to be away from urban living and looked forward to raising a family in an area which had clean air and no youth gangs. John quit his job, they sold their house and put all of their equity into paying in full for the property in Ompah Township which is the subject of this claim against the Ontario New Home Warranty Program. After looking at many properties, they discovered this house with pine siding in a wooded area which was said to be "brand new" on the real estate listing.

Entering the home after a drive in a winter snowstorm, they were warmly greeted by Gail Carrafiello ("Gail"); and the real estate agent Fran Wong joined them later. John Gamble stated that on arriving at the house, it was obvious that people were living there. There was a refrigerator and a stove and some cupboards; but no stair railings while interior doors were needed and trim was not completed. There was no mention of the Ontario New Home Warranty Program either by Gail or by Fran Wong, he said. He expected that he would be able to do obtain work in the area as a sheet metal mechanic.

Gail went into personal bankruptcy on July 6, 1989, so the final closing of the purchase was delayed to August 2, when a deed was available from her Trustee. His lawyer told him that the

house might not be covered by the Ontario New Home Warranty Program but he went ahead with the closing.

Since the home in Oshawa had been sold and the truck was loaded with their possessions, the Gambles moved in on July 6 and 7 because they had no alternative, he said. The carpet was not laid and some doors were missing. A dip in the roof of the house was noticed, and on entering the basement crawl space, Gamble saw several concrete bases without vertical beams arising to hold up the floor. On speaking with his lawyer on July 10, he was informed that the deed would be delayed and that he should move out if he did not like to delay.

By the Fall of 1989, the roof was leaking and there seemed to be insufficient insulation. On calling the Township Building Inspector, he was informed that the house had not been inspected; and the New Home Warranty Program was first contacted in late 1989 with a letter sent in mid-January, 1990.

The house was vacated by the Gambles in December, 1990, as it was unsafe in their opinion and could collapse. The carpets had mould and the entrance lane is now blocked off.

The Gambles have lived in Barrie since they vacated their home where they rent accommodation for their two young children and Cathy Gamble works part-time. All of their savings are in the Ompah property which is now subject to a \$30,000 claim for the cost of possible legal fees by their solicitors, Gowling & Henderson.

Gamble recalled the letter received from Peter Watkins, an Investigator from the Eastern Ontario district under the Ontario New Home Warranty Program which said in part:

I have since met with Mr. Stan Johnston your Township Reeve as well your neighbour. He advises that Sam Carrafello (sic) as well as his wife Gail, lived in the home for at least six months, and maybe up to a year prior to your purchase of it.

As a result of this information, I am sorry to inform you the home will not be covered by the Warranty Program.

As a witness for the appellants, Sam Carrafiello ("Sam") was called to give evidence. He is now a Corrections Officer with the Ontario Ministry of the Solicitor General. Since 1986, he was a self-employed contractor/builder carrying on business as

"Countryside Custom Log Homes" with his wife, Gail, as a partner. The business was not registered under the Ontario New Home Warranty Program and built only seasonal cottages for owners of lots.

Two parcels of land were purchased from Sam Johnston who lived across the road, and title was in Gail's name. His plan was to build on the first lot, sell at a profit and then build a permanent home for himself, Gail and their three daughters on the second lot; which is now the Gamble property.

The first home was sold with possession to be a year away so that there would be ample time to build the second home without immediate pressures and as time and materials would be available. In September, 1987, the lot was cleared, a well drilled and a septic tank and foundation footings put in. The house was constructed in March, 1988. Then on a three-week notice, the first house had to be available and Sam and Gail and their three daughters moved into the incomplete house in May, 1988, as there was no other rental accommodation in the area.

There was no front deck, the cabinets were not in and trim work was required. As well the tongue-in-groove walls for the den were not completed. From May to August, 1988, Sam lived there with his family who remained there until June, 1989. Sam was not involved in the sale of the house but promised to complete the outstanding work needed. On cross-examination, Sam noted that Gail was the Township Clerk and her earnings paid off part of the lot price with the balance paid off from the mortgage placed when construction began.

The application for the Building Permit has no number written in the box for the builder's registration number and shows Gail as owner with Sam as contractor and preparer of plans. The Building Permit was issued on October 20, 1987, to Sam, whose name is on line for "Owner's name", and who is also shown as the contractor.

In her evidence, Gail Carrafiello stated that she is now living near Belleville where she is the Deputy Clerk-Treasurer of the Town of Picton. She had been the Clerk of the Township of Ompah, and did the bookkeeping for the construction/partnership business in which she was a partner.

She said that Sam had found the two lots and the title was in her name. She admits to no knowledge of building but had done some sketches of her wants in a new home. When the sudden move had to occur, work was hurriedly done and Sam Johnston did some of their stone work. She paid tradesmen to finish the electrical work and moved in with carpets not laid and the trim not

done. This home is in the Township beside Ompah and she sought to sell this house and move away. The house was listed as "brand new" and internal items had to be completed. The house was a year old by the time that the Gambles purchased, she said, and they knew that she and her daughters were living there. That was confirmed by her in the letter to the New Home Warranty Plan that said:

I had lived in my house for exactly 1 year
and 1 month (May 1 - 88 to June 30, 1989).
If you require additional information
please do not hesitate to call me.

There are now structural concerns for the safety of this house, and Gail said that she was very sorry for what the Gambles had been put through. On cross-examination she noted that monies from the sale of the other house and her own earnings and earnings from Sam's shoe business all went to pay for materials for this house. Accounts were made to the business and either she or Sam wrote the cheques. On moving, the same telephone number was kept and her driver's licence address was changed to this location. On her bankruptcy, a second lot went back to its mortgagee with some legal problems still outstanding due to the incorrect registration of a discharge of mortgage on the wrong lot.

For the New Home Warranty Program, Sam Johnston was called as a witness. He is a registered builder with the New Home Warranty Program, is a real estate salesman, has a trailer park and two school buses, owns lots in the area, is Reeve of the Township of Clarendon and Miller and lives across the road from the Gamble house. This road is Highway 509 and divides his 80 acres of land. He has obtained some severances and there were four lots on the "Gamble" side and seven or eight lots on the other side, where he has built houses on three lots, and where his own older home is also located.

The lot for the "Gamble" house was sold in 1986 for \$10,00.00 with a \$9,000.00 mortgage taken back. That mortgage was paid off and a second lot was sold to the Carrafiellos. That second lot has become an asset of the Trustee in Bankruptcy. Johnston said that he had helped to do some stone work for a few hours only and was in the house several times in the early summer of 1988. He said that Gail Carrafiello and her daughters lived there from then until June, 1989. He did not know exactly when they moved out but he did go over later in the year and meet Mr. and Mrs. Gamble as a neighbour.

Peter Watkins is an Inspector with the New Home Warranty Plan and has been in the Eastern Ontario region for three and one-half years. He is responsible to seek out unregistered builders

and unenrolled homes and for 18 years had been a member of the Ottawa and Perth police forces. He reviewed his decision letter of February 12, 1990, which has been referred to earlier. He recalled a telephone conversation with John Gamble on January 12, 1990 after which he sought documents that he received on January 17 and he then visited the property on February 9. He spoke with Johnston and on September 26, 1990, issued the decision letter with respect to the claim for warranty coverage on this property which after the usual general information stated as follows:

With respect to your original request for warranty coverage received January 17, 1990, the Ontario New Home Warranty Program denies warranty coverage for the home located on Part Lot #41, Plan 13R6145 in the Township of Clarendon.

On February 9, 1990 I met with you at your home and was told by you that you purchased the home from the builder who had lived in the home for an undetermined amount of time.

The same day I met with Stan Johnston, the Reeve of Clarendon and Miller Townships, as well he is a neighbour of yours. He advised me that the home had been occupied by Sam and Gail Carrafiello (sic) for a period of at least six months and possibly a year prior to your purchase of the home.

I have since spoken to Fran Wong, the listing and selling agent for Century 21 Champ Realty Ltd. She advised me when you were shown the home, the Carrafiellos (sic) were living in it and had been living there for about one to one and a half years.

There is no question in my mind that the home you purchased was previously lived in and therefore is a used home and doesn't qualify for warranty coverage.

Watkins obtained from Gail Carrafiello the letter referred to earlier showing occupancy of 13 months by her and her daughters. In his opinion, Sam Carrafiello built this house on a lot owned by Gail Carrafiello and neither he nor Countryside Custom Log Homes were registered builders nor was this house enroled in

the New Home Warranty Plan. He acknowledged that a building official must enquire where a registration is not entered by a builder for a home and that a building permit could be issued without a number for a person's own home which was, in his view, the situation here.

On behalf of the appellants, counsel set out two scenarios. In the first, the Gambles are owners while Gail is a vendor and Sam is a builder. Since the Act contemplates that "previously occupied" means by new home owners or buyers, it does not contemplate that the phrase means occupation by builders and therefore the Gambles are entitled to warranty coverage. In the second, Sam is a builder/vendor and Gail is an owner with the Gambles being owners in succession in title from Gail, and therefore entitled to warranty coverage. He suggested that the Tribunal not follow the example of the decision with respect to Laurent and Irene Roberge (1990) 20 CRAT 370 where those persons bought a home having been told by their solicitor that the home had been previously occupied by the vendor and that the property was not covered under the Ontario New Home Warranty Act. They proceeded to complete the purchase and their claim with respect to certain leaks in the basement was rejected. That recent decision notes at p.373:

Mr. Roberge agreed that he knew as of the closing date that the home which had stood vacant for about two years may not be covered by the Plan, but he and his wife went ahead with the purchase since their own home had been sold and they had to have a home in which to live.

In that decision, the Tribunal concluded at p.374 that:

On the evidence before the Tribunal, we find that this home was 'previously occupied' so that any claim by these owners, Mr. and Mrs. Roberge cannot be maintained against the Plan. Since Mr. and Mrs. Roberge by their own letter acknowledged that they were aware of a possible lack of coverage by the Plan before they completed the closing of the purchase, they knowingly ran the risk of lack of coverage. If they were misled by others as to that coverage, they may well have remedies against those persons.

In addition, counsel referred the Tribunal to the decision of Lou Morin and Sybil Shaver (1990) 20 CRAT 380 where a condominium unit had not been previously occupied. After the view of liberal construction of consumer protection legislation, the Tribunal found that those applicants were the first occupants of the unit. Counsel suggests that the Tribunal in the Gamble situation should be equally generous in interpretation.

With respect to the question of the beginning of the warranty period, the Tribunal acknowledges that if the Gambles are purchasers of a home not previously occupied into which they moved in July, 1989, then the complaint which they made is within the year of occupancy and is a valid complaint. Further, if the Gambles are successors in title from Gail Carrafiello as defined as an owner, then the claim with respect to a major structural defect is also valid since the home was completed in late 1988.

In reply, counsel for the New Home Warranty Program reviewed the warranty provisions in Section 13 of the Act. There the warranty is set out as something which "every vendor of a home warrants to the owner". He states that the deed in this case came to Mr. and Mrs. Gamble from the Trustee in bankruptcy of Gail Carrafiello and that Trustee was the vendor. As a result, this was not the sale of a previously unoccupied home and neither Gail Carrafiello or Sam Carrafiello are vendors. There is certainly no question that this house was previously occupied and that was known to Mr. and Mrs. Gamble when they purchased the home. In any event, the builder is said to be Countryside Custom Log Homes, which is a registered partnership of Sam and Gail Carrafiello and which business is now defunct. That name does not appear as vendor or owner in any document before the Tribunal.

In his view, the Roberge decision is a clear precedent to be followed by this Tribunal. He noted that in 1990, some \$25,000,000 was paid out by the Ontario New Home Warranty's Program and 15% of that money went to homes which were not, in fact, enroled in the plan. If a home is enroled and the definitions of owner and vendor, as defined, are met then coverage does occur. In this case, in his opinion, this home is not warranted, the Gambles are not defined as owners and the vendor to them is not the builder of the home so that there is no warranty obligation by the Ontario New Home Warranty Plan.

In this appeal, we find that Sam built this house on Gail's lot and that Sam and Gail were partners in the now defunct construction business. Sam was an unregistered builder and the home was not enroled in the Plan. The lack of a builder's registration number on the application for a building permit shows that the home was constructed for their own use. The outlined

sketches of Gail's wishes in a house do not make Sam's construction of the house into a situation of him being a builder constructing a home under contract with an owner. Without question, the home was occupied for more than a year by Gail and her three daughters. From the definition section of the Ontario New Home Warranties Plan Act:

1. (g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;
- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner.

We have considered the facts set before us and conclude that Sam cannot be a vendor since he did not have title to a home not previously occupied. Sam is also not a builder, registered or unregistered, who constructed a home under a contract with the owner, Gail, who was a partner in the construction business and who occupied the house for some 13 months.

The "owner" throughout was Gail who lived in the house and became the vendor. She did not, in fact, acquire a house from its vendor but bought a lot and had her own house built on it.

The Gambles may well have various claims against other parties for their losses. However, they do not have a claim against the Ontario New Home Warranty Plan.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MADELINE GARTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RONALD POIRIER, Vice-Chairman, Presiding
BARBARA NICHOLS, Member
D.H. MACFARLANE, Member

APPEARANCES:
MADELINE GARTON, appearing on her own behalf
STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF 22 March 1991
HEARING: 3 April 1991 Thunder Bay

MAJORITY DECISION

This is an appeal from the decision of the Ontario New Home Warranty Program dated November 30, 1990, to disallow a claim for damages initiated by the Applicant Madeline Garton. The home in question is situate at 2106 Bordeaux Crescent in the City of Thunder Bay and was built by Concept Construction Unlimited herein referred to as the builder.

The facts in the appeal do not appear to be in dispute. After moving into her new home, the Applicant observed a number of defects which she reported to the builder; all of which were satisfactorily corrected but one. That problem has been the subject of much evidence on this hearing and there is little doubt that as of the date of this hearing that in a number of rooms in Mrs. Garton's home where the ceiling meets the interior walls, there are a number of long cracks with gaps of up to an inch in width.

Mrs. Garton reported this condition to the Warranty Program well within the one year limitation period stipulated by the Act and by letter dated November 30, 1990 from the Ontario New Home Warranty Program to Mrs. Garton signed by N.M. Plichta, Regional Manager, the Program offered Mrs. Garton \$100.00 to correct the deficiency. Mrs. Garton refused the said cash settlement and brought before us Mr. Favot, a well known and highly

experienced tradesman who estimated the costs of repairs to be \$3,508.00. This estimate was not seriously challenged by counsel for the Program and remains as the only guide upon which to fix any damages that may be awarded.

Mr. Austin, counsel for the Program, takes the position throughout this hearing that the repairs required by the Applicant are not covered by the warranty in Section 13 of the Act because there is no evidence that there was any breach of any of the conditions outlined in Section 13(1)(a). It is the Program's position that the problems being experienced by the Applicant are the result of a phenomenon known as "truss uplifting". From evidence presented at this trial by way of experts and articles filed as exhibits, it would appear that no one is totally convinced that they understand perfectly the cause of this phenomenon, but there now appears to be a commonly accepted theory. It would appear that in some homes where the roof is supported by trusses, the trusses will move in such a way that the bottom chord of the truss will bow by as much as one inch. It is this bowing that lifts the gypsum panels of the ceiling membrane away from the partition panels and leaves the cracks currently found in the Applicant's home.

The theory as to the cause of this phenomenon is probably best explained in an article filed as Exhibit 16 on this appeal entitled DRYWALL TECHNIQUES MINIMIZE TRUSS UPLIFT PROBLEMS. At page one of the Exhibit, the author states:

There is evidence that differences exist in temperature and moisture content between the upper and lower chords of the roof trusses. The lower chords of the trusses to which the ceiling panels are attached are in close proximity to the heated interior spaces of the house and are frequently covered with insulation. Water vapour migrates to the colder surfaces, causing the fibres of the upper chords to elongate which results in a slight lengthening of the upper chord relative to the lower chords. When an upper chord expands, it results in the lower chords bowing upward near its centre.

While the amount of swelling and shrinkage along the length of the wood fibres is quite small, there is probably enough to account for much of the truss arching that has been observed. Furthermore, there is

strong evidence that a pronounced slope in the grain of a piece of lumber will increase the amount of longitudinal shrinkage. Certain types of wood also exhibit excessive longitudinal shrinkage and, although difficult to recognize these should be avoided in truss construction where longitudinal stability is important.

All experts called by both the Program and the Applicant agree that the cause of the Applicant's problems is "truss uplifting". The issue the Tribunal has to decide, therefore, is whether this is covered by Section 13(1)(a) of the Act. It is conceded that the home was fit for habitation and was constructed in accordance with the Ontario Building Code and, therefore, we are left to determine whether Section 13(1)(a) has application.

The major problem we are faced with in making this determination is that there was no evidence presented as to the manner of construction. In Exhibit 16 at page 2, the author makes four suggestions which might remedy the problem of truss uplift. Even though it would appear that this problem has been well known in the industry for quite some time, there has been no evidence called by the builder to suggest he did anything aimed at preventing or correcting the problem. Even though the Applicant carries the burden of proof in establishing a breach of section 13(1)(a)(i), it would be totally unfair to expect that in circumstances such as this where the type of lumber selected can be a factor, that Mrs. Garton should be expected to show the builder did not use due care in the selection process.

It appears clear on the balance of probabilities that it is the wood shrinkage that caused the Applicant's problems and no evidence being presented by the Program as to whether the builder exercised any care whatsoever in selecting the said trusses or as to the type of wood selected, then unless the builder can rely on an exclusion in the Act, the responsibility should be his.

Mr. Austin points to Section 13(2)(d) which states that "a warranty under subsection (1) does not apply in respect of ...normal shrinkage of materials caused by drying after construction."

The evidence at this hearing was to the effect that of the large number of homes build annually in the Thunder Bay area, only one or two experienced this truss uplift problem. This would seem to suggest that in the homes which were affected, the shrinkage was certainly not what could be categorized as normal.

The exclusion in section 13(2)(d) is therefore inapplicable.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to repair the Applicant's property or pay her damages in the amount of \$3,508.00.

Ronald Poirier
Vice-Chairman, presiding

Barbara Nichols, Member

DISSENTING DECISION

This is an appeal from the decision of the Ontario New Home Warranty Program dated November 30, 1990, to disallow a claim for damages initiated by the Applicant Madeline Garton. The home in question is situate at 2106 Bordeaux Crescent in the City of Thunder Bay and was built by Concept Construction Unlimited herein referred to as the builder.

The facts point to in all probability that damages to the home were caused by what is known in the Industry as "Truss Uplift", but it should be noted that no one actually entered the attic space to observe the roof trusses and determine positively that the trusses had arched or shrinkage had taken place.

For explanation of truss uplift, I quote the Code and Construction Guide for Housing issued by the Ontario Ministry of Housing, Building Branch and the Ontario New Home Warranty Program, Technical Research and Training Department, First Edition - November 1990. This Guide is not a substitute for the Ontario Building Code and is not a legal document. The Ontario Building Code does not address "Truss Uplift".

Page 14 - 8 from the Guide

Truss Uplift

Truss Uplift is the result of an internal upward stress within a truss. It occurs typically in winter when the top chords are exposed to colder temperatures than the bottom chord which is generally covered with attic insulation. Wood shrinkage depends on the relative humidity that the wood is exposed to. Bottom and top chords can be exposed to conditions which differ dramatically in winter, with the top exposed to higher relative humidity. The result is that the bottom chord tends to shrink relative to the top chord. The bottom chord can bow upward because of this differential shrinkage depending on the climate, truss design and wood used.

Some lumber is more prone to this problem. Juvenile wood from the core of a tree, compression wood which is from the down

side of a tree that was on a hill, and wood with a high slope in its grain are most susceptible. Every winter these types of lumber cause truss uplift problems which can damage interior finishes.

Trusses with greater slopes have less damage resulting from uplift than those trusses with smaller slopes.

The practices that follow have been developed to help minimize the damage caused to interior finishes.

The key sentence "Wood shrinkage" depends on relative humidity that wood is exposed to. The result is the bottom chord tends to shrink relative to the top chord.

I further quote Exhibit 16, Canadian Building News Technical Feature entitled "Drywall Techniques Minimize Truss Uplift Problems":

In recent years, there has been a growing problem in houses built with wood roof trusses, particularly in Canada and the northern U.S. Cracks appear in the drywall joints between ceilings and the tops of non-loadbearing interior partitions, especially at the intersections near the centre span of the roof trusses. These cracks generally open up in winter and close, sometimes completely, in the spring and summer. Foundation settlement, floor-joist shrinkage and soil movement are causes of such cracks in some houses, but these factors do not fully account for the current problem.

Another major cause of wall-ceiling cracks has been identified as "ceiling-truss uplift" - an upward bowing of the bottom chord of a roof truss, sometimes by as much as one inch, which is not directly caused by the previously mentioned factors. This upward bowing lifts the gypsum panels of

the ceiling membrane away from the partition panels. Despite considerable

study by such groups as the Housing and Urban Development Association of Canada, National Research Council of Canada and Forintek Canada Corp., the actual cause of the ceiling truss uplift has not been definitely established.

While further research is certainly needed, current studies do indicate some factors which seem likely to contribute to the problem.

There is evidence that differences exist in temperature and moisture content between the upper and lower chords of the roof trusses. The lower chords of the trusses to which the ceiling panels are attached are in close proximity to the heated interior spaces of the house and are frequently covered with insulation. (This may help to explain why the problem has occurred more frequently since insulation standards have been raised, thus increasing the temperature differential between insulated and uninsulated surfaces.

Water vapour migrates to the colder surfaces, causing the fibres of the upper chords to elongate which results in a slight lengthening of the upper chord relative to the lower chords. When an upper chord expands, it results in the lower chords bowing upward near its centre.

While the amount of swelling and shrinkage along the length of the wood fibres is quite small, there is probably enough to account for much of the truss arching that has been observed. Furthermore, there is strong evidence that a pronounced slope in the grain of a piece of lumber will increase the amount of longitudinal shrinkage. Certain types of wood also exhibit excessive longitudinal shrinkage and, although difficult to recognize these should be avoided in truss construction where longitudinal stability is important.

The key sentences are:

- (1) ...the actual cause of the ceiling truss uplift has not been definitely established
- (2) While the amount of swelling and **shrinkage** along the length of the wood fibres is quite small...
- (3) ...will increase the amount of longitudinal **shrinkage**
- (4) Certain types of wood also exhibit excessive longitudinal **shrinkage**. There is no evidence that any different type of wood was used.

The evidence addressing damages were photographs, Exhibit 14, presented by the Applicant. It was very difficult to assess the amount of damage from these photos as the only photos showing any cracks were Photo #14(D) and (E), and they were of the same corner in the same room.

There is also a widely varying estimate of damages, ranging from the Ontario New Home Warranty Program's estimate of \$100.00 to \$3,885.00 from Johnsons Painting (Thunder Bay) Ltd. Mr. Austin did not have any dispute with these claims, but I certainly could not see from the photographs anything near the higher estimate.

To come to a conclusion in this case, I had to determine the following:

- (1) Was the home constructed in a workmanlike manner?
- (2) Was it free from defects in materials?
- (3) Was the damage caused by normal shrinkage of materials caused by normal drying after construction?

My conclusion was affirmative on these points. And further with respect to the question of whether the builder could have done anything different to prevent this occurrence, the answer would, in my opinion, be no - he could not.

We listened to the evidence of the Truss manufacturer with some 27 years of experience and he advised that he could do nothing any different in manufacturing the trusses.

Tribunals have ruled in the past that minor cracks caused by shrinkage of materials in basement walls, concrete floors, plaster or drywall are not warranted under the Act.

Mrs. Garton purchased a new home and in so doing purchased a limited warranty, which is not unlike all warranties, in that there are exclusions. Almost all warranties have exclusions and to determine why certain items are excluded, one must try to determine why the authors arrived at their decision. My opinion of Exclusion 13(2)(d) was that they realized the climatic conditions houses are built under, and they knew that using concrete and lumber under these or for that matter any conditions, materials will shrink and in so doing will contract, warp, bend, create cracks and nail-pops, warp floor joists, wall studs, ceiling joints, Roof Rafters and last of all Roof Trusses.

For the above stated reasons, I find that the appeal fails under Section 13(2)(d) of the Ontario New Home Warranties Plan Act.

D.H. MacFarlane, Member

ROBIN AND PAULA GHOSH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
WILLIAM WATSON, Member

APPEARANCES:
ROBIN AND PAULA GHOSH, appearing on their own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 31 October 1991 Ottawa

REASONS FOR DECISION AND ORDER

In this matter, Robin and Paula Ghosh are appealing from the decision of the Ontario New Home Warranty Program dated January 3, 1991 disallowing their claim for the repair and replacement of cracked tiles in the foyer and powder room of their home.

The only issue before this Tribunal is whether or not the tiles were a warrantable item since they were an extra and not supplied by the builder. The Program, however, has also raised the issue of the claim not having been made within the first year pursuant to section 13(4) of the Ontario New Home Warranties Plan Act.

Mr. and Mrs. Ghosh took possession of their home on August 14, 1987 and were the first owners. It appears there were a number of extras which the builder agreed to provide, but included in the list of extras was a credit to the purchasers for the following:

- 16 credits for vestibule flooring, foyer carpets, powder room flooring, and the ½" plywood. purchaser putting tile in the above area needs ½" plywood and will be charged for by Universal (labor) Purchaser to pay all upgrades to Universal including labour

Accompanying the list of extras was a Proposal from Universal Ceramic & Tile which reads:

Ceramic, Plywood and marble sills at vestibule, foyer and powder room	
Ceramic # 358 Camel 8x8 = labour and materials	1,575.18
Plywood - $\frac{1}{2}$ inch supplied and installed	
Beach buff grout	<u>488.00</u>
	2,063.18
PRICE AGREED TO	1,900.00
Deposited \$950.00 March 24, 1987	
Will mail post dated cheque	

50% deposit on Agreement - Post dated cheque to June for balance

It was signed by Mr. Ghosh and a representative of the company.

The document clearly indicates the homeowner had entered into a contract for the work to be performed not by the builder, but by a third party.

During the first year of their occupancy, the appellants noticed certain tiles beginning to show cracks in both the foyer and the powder room. They notified the builder by submitting a year end deficiency list in which items 32 and 40 refer to the tile. It appears the builder addressed all 74 items on the list adequately with the exception of the cracked tiles which were not replaced.

In a letter to the Warranty Program of April 3, 1989, Ghosh complained that this item remained. This appears to be the first notice of the problem received by the Program directly from Ghosh although he had directed to it a copy of a letter to the builder sent on March 8, 1989.

The builder, James Moyer of Macdonald Homes Inc. arranged an inspection of the home which took place on April 12, 1989 with a representative of Universal Tile also present.

Subsequent to the inspection, the builder wrote to Ghosh on April 13 reporting his findings as follows:

.....
Our inspection did not reveal any structural fault with the home. However,

there certainly were some cracked tiles. Since we had given you a credit for the flooring in the area in question and you contracted separately with Universal Tile for the installation of the flooring, we will assume no responsibility for repair or replacement of any cracked tiles. We will however make every effort to help in seeing that a mutually satisfactory solution can be arrived at between yourself and your contractor for necessary repairs.

I understand that during the April 12, 1989 meeting Universal Tile did indicate that matching tiles were being shipped from out-of-town and that when received they would make arrangements directly with you for the necessary repairs. The tiles apparently should be received in about three weeks time.

.....

The Program also reported to Ghosh making clear the tiles were not a warrantable item:

.....

The crack at the front entry is perpendicular to the joists, however, it does appear to be in line with a seam in the subfloor (aspenite). The crack in the powder room is parallel to the joists and no practical method of viewing the cause was possible.

There is a total of approximately 10 tiles involved. There is no readily noticeable Ontario Building Code infraction, and the tiles are installed in good workmanlike manner. These cracks do happen in the natural course of events at odd times and are not necessarily the result of any defect in construction.

As the owner's dealt with the sub trade (Universal Tile) directly, your builder's warranty is not enforceable in this case. The representative from Universal Tile did however, mention he would replace the said tiles.

The tiles apparently were replaced, but Ghosh again wrote to the Program a year later complaining of the tiles cracking in the same locations and suggesting that a major structural defect existed or may exist. He, therefore, requested a further inspection and "an assessment of the framing of our home".

Mr. Paul Picard returned to inspect the area on May 24, 1990 and reported to Ghosh as follows:

ONTARIO NEW HOME WARRANTY PROGRAM
190 COLONNADE ROAD, NEPEAN, ONTARIO K2E 7J5

May 24, 1990

Ref.#01-48 (46342)

Mr. and Mrs. Ghosh
65 Pittaway Ave.
Ottawa, Ontario
K1G 4P1

Dear Mr. and Mrs. Ghosh:

Further to your request, I attended your home to view the recurring cracks in your ceramic tile. I believe the cracks are in the same location as the previous ones and that the cause is not related to any defect in material

The floor framing in the foyer and powder room consists of #1 Spruce 400 mm on centre sparing 3.14 and 4.03m respectively. The floor joists were then clad with 5/8" (15.9mm). The above is the extent of your builder's work supplied by him.

At this time, I did note Ontario Building Code deficiencies which may in fact be the cause of the cracking. Firstly, the underlay used (unknown quality) is at best only 13mm ($\frac{1}{2}$ ") thick, the code requires under ceramic tile with these framing conditions for the underlay to be of 15.9mm (5/8") thick (section 9.31.6.3(2)). Further, I also doubt that the seams of the underlay and subfloor are properly offset.

A second observation made on this day, is that under the areas of ceramic tiles no nails were found protruding through the subfloor and that when the floor was walked upon, cracking was heard in various areas. This leads one to suspect of inadequate or improper nailing of the underlay to the subfloor. The Ontario Building Code section 9.23.3.2(1) requires all nails to be long enough so that $\frac{1}{2}$ their length penetrates into the second member, table 9.23.3.B. requires the minimum length of nails for 15.9mm subfloor to be 45mm (1 $\frac{3}{4}$ "). Although these sections apply for subfloor, the same is held true for underlay when not otherwise specified. You will note that section 9.31.2.5 does not specify the length of nails for this thickness underlay as it is not listed, however, under almost all situations one expects to see the nails protruding past the underside of the subfloor.

It is my considered opinion that the nailing of the underlay and the thickness of the underlay are contributing factors to the problem, however, this is not your builder's responsibility, but rather the subtrade you engaged to perform the work.

I sincerely hope the above is adequate, should you have any questions please call.

Yours truly,
 Paul Picard
 Senior Conciliator, Tech./Rep.,
 PP/dp
 c.c. - Builder - Attention: Paul Rochon
 File

In his evidence, Mr. Picard, senior conciliator for the Program, said he had visited the home on two occasions. He had measured the joist and spans and found no defects. The underlay, however, was only $\frac{1}{2}$ " whereas it should have been $\frac{5}{8}$ " to support the ceramic tile. He had measured the thickness of the underlay after removing the heat register. He further observed no nail points. His conclusion was that there had to be some movement in the underlay and the subflooring was not properly fastened. This

however in his opinion was not the fault of the builder who had not installed it.

It is the conclusion of this Tribunal that there is no evidence of a major structural defect. The main issue then is whether or not the tiles were warrantable.

Section 13(1)(2) of the Ontario New Home Warranties Plan Act provides:

- (2) A warranty under subsection (1) does not apply in respect of,
 - (a) defects in materials, design and workmanship supplied by the owner;
 -
 - (g) alterations, deletions or additions made by the owner;

Mr. Ghosh had entered into a separate contract with Universal Tiles to supply the labour and materials for the areas complained and as a result, we can find no liability on the builder or the Program. Universal Tile had throughout the negotiations assumed the responsibility and had replaced the tiles. If the cause, as suggested by Mr. Picard, is the insufficient thickness of the underlay and length of the nails, the fault must lie with the installer Universal. This Tribunal can, on the evidence, find no other reason for the complaint.

The second issue raised by the Program that no notice of defect was made within the first year is not important to this decision. Mr. Ghosh said that he had mailed a copy of the Deficiency Sheet recording the cracked tiles to the Program within the year. The Program has no record of its receipt. There is no other evidence before us since the documents and exhibits do not support the evidence of Mr. Ghosh. Our conclusion, therefore, is that although Mr. Ghosh did advise the builder of this complaint within the year, we cannot find that he advised the Program pursuant to the requirements of the Act.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

JOEL GLASS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:
JOEL GLASS, appearing on his own behalf
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 21 August 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in a letter dated April 10, 1990. The decision set out therein is an unusual one in that the Program did not deny that the Applicant has a valid complaint which was covered by its warranty but rather stated, in the circumstances of the case, it was prevented "from taking any further action". It was conceded by the Program at the hearing that the Applicant was entitled to have a remedy but there was complete disagreement between the parties as to what the remedy should be. The facts and circumstances which give rise to this unusual state of affairs were the following.

On August 15, 1988, Cheryl Glass, wife of the Applicant, entered into an Agreement of Purchase and Sale to purchase premises known as 22 Trinity Crescent in Richmond Hill, Ontario, for \$455,000 upon which a house was to be constructed in accordance with certain specifications set out in Schedules attached thereto. Upon the closing of the transaction, the deed or transfer was taken in the name of both the Applicant and his wife and it was agreed that the Applicant had status to maintain this claim.

Clauses Nos. 3, 13 and 20 of Schedule A attached to the Offer provided:

3. Oak staircase, with oak hand rails, oak pickets, oak stringers, and oak nosings (main staircase and the open staircase to the basement) to be stained dark according to purchaser's specifications.
13. Living room and dining room and library hardwood strip flooring to be stained dark ebony same as staircase.
20. Purchaser's choice of interior colours and materials from vendor's samples to be selected within 10 days from the date of acceptance.

We also had as an exhibit, a document headed "Trinity Estates" (the name of the subdivision) referring to Lot 14 (the number of the lot on the plan) and dated August 30, 1988, which set out colours and descriptions of various items concerning which the purchasers had choices in the finishing of the house. Under the heading "Stains", the stairs and hardwood floors, as well as certain other items, were indicated to be "warm ebony No. 6367" which number referred to that of a picture sample of the colour on a colour chart supplied by a company known as "Color Your World". The evidence established that the vendor supplied a copy of this chart to the purchasers, together with whatever samples of other items to be picked out at the time of the meeting contemplated in clause 20 above to make these choices.

While this colour, shown on the chart, is not pure or straight black, it's basic colour is black and comes through with the lines of the grain of wood showing as quite a dark gray. It is also of some consequence to note that photographs of certain marble on floors (which are white and black) of the face of a dishwasher (which is black) of rugs (which are gray) and of colours shown for other items in the list aforementioned (which are shades of gray and white) all show a harmonized colour scheme of white, gray and black. It is important to add that the staircase is, in fact, quite a centrepiece of this house as it is a reasonably large spiral staircase joining three floors from the basement to the upstairs, and is right in the middle of the house and of the front hall, so that a mismatch of its colour with the rest of the colour scheme of the house is all the more consequential.

The evidence presented to the Tribunal as to the actual stain used to finish either the staircase or the hardwood floors is such that it cannot be found as a probability whether Color Your World semi-transparent stain "warm ebony no. 6367" was used or not.

All we have is the evidence that the builder's supervisor on the job told both the principal of the building company and the Applicant that the two different subcontractors, who finished the stairs and the floors respectively, told him that in the one case the floor finisher used a Duraseal product and the stair finisher used Color Your World semi-transparent stain no. 6367. In the result, however, the colour of the floor finish is quite close to what the purchasers specified and wanted to fit into the colour of the house aforementioned and is acceptable to the Applicant. The finish of the staircase is not.

The Applicant told the Tribunal that he was present at the house on a Sunday when the painter was starting to apply the final varnish over the incorrect colour on the stairs. The floors had already been finished at that time. Photographs filed as exhibits, taken by both the Applicant and the conciliator on behalf of the Program, Mr. Moffitt, show that the finish of the stairs varies from quite a light to quite a dark brown. Some of the photographs from both sets also show unacceptable workmanship in the application of the stain to the parts of the staircase where it varies greatly in colour and some places seem to have been missed altogether. The most important point of contrast, however, is that while the basic colour in the finish of the floor is black, or dark gray, the basic colour in the finish of the stairway is brown with variations with the grain of the wood, and the various differences of application of the amount of stain as aforementioned.

When the Applicant saw this discrepancy in the colour of the finish of the staircase, he attempted to stop the painting contractor from covering it with varnish, (his evidence was that about one-quarter of the staircase was done at that time) but the subcontractor would not stop and the Applicant could not contact the builder's representatives, probably because it was Sunday. In the event, the varnishing over the wrong colour was completed before the Applicant could get anything done about it.

The Applicant continued to complain, first to the builder and later to the Program. It would have been a relatively easy and inexpensive matter to have restrained the staircase to match the floors if the problem had been addressed before the varnish was put over the stain. Thereafter, it became a much greater problem. A good deal of evidence and examination and cross-examination at the hearing was directed toward trying to prove or disprove that warm ebony no. 6367 was used or not used on the stairs, and as to how different colours or shades of colour result from different methods of application of the stain, whether it is wiped after being applied and how much time is allowed between the application and the wiping. Also there was considerable evidence concerning the

lighting used for the taking of photographs and the different shades of colour which differences in the lighting can give.

In the view of the Tribunal, none of this was very helpful. The obligation of the vendor/builder was to deliver a finished house in accordance with its contract and up to the standard of the various warranties required of it rather than to use certain products or materials in certain ways regardless of the result obtained.

Upon all of the evidence before it, the Tribunal finds that it is the finish of the staircase and not that of the floor, which is defective and that to remedy the situation, it is the finish of the staircase and not that of the floors which must be changed. It is clear from the wording of the contractual provision as to these colours, included in the Agreement of Purchase and Sale aforementioned, that the staircase was to be stained dark, according to the purchaser's specifications, that the hardwood floors were to be stained dark ebony the same as the staircase, that dark ebony is a black rather than a brown-based colour, and the colour shown on the chart provided for the vendor corroborates this, that such a black-based colour fits into the rest of the colour scheme of the house, while a brown-based one does not, that the floors were delivered in this colour and are acceptable to the Applicant, and that the stairs was not.

Normally, the Tribunal would not interfere with the decision of the Program dealing only with an issue of the match of colours. However, here we have a complaint of a defect of sufficient dimension to constitute a breach of the warranty required by Section 13(1)(a)(i) of the Ontario New Home Warranties Plan Act to construct the home in a workmanlike manner. It is admitted by the Program that the mismatch in colour is so great as to constitute a warranted defect. In his observation under Item 5 in Schedule "A(1)" to his Conciliation Report following the inspection on February 19, 1990, Mr. Moffitt said that the shading differences were excessive.

It appears to the Tribunal that the decision of the builder and of the Program to offer to sand and refinish the floors rather than refinish the staircase has been reached, not because it is the floor colour rather than the staircase which is out of line but rather because it is believed the cost of recolouring the floors will be considerably less. Particularly when the Applicant tried to get the painter, for whose actions the builder is responsible to him, to stop varnishing when no more than one-quarter of the damage resulting from the varnishing of the incorrect colour was done and when the painter could see as well as anyone what the problem was, the Applicant should not have to

accept the present situation unless there is some clear bar to his success based upon the application of the provisions of the Ontario New Home Warranties Plan Act or its regulations to the facts of the case.

Counsel for the Program argued four grounds for such a conclusion. First, she said, that the Proposal of the Program will correct the mistake. This is clearly not so as the mistake is in the colour of the staircase and not in that of the floors.

Secondly, she said, that the deficiency is attributable neither to a defect or a substitution as defined in the regulations and is therefore not warrantable. In view of the finding of the Tribunal noted above, we need not pursue this question of substitution. No one can tell from the evidence whether the Color Your World semi-transparent stain no. 6367 was used on the staircase or not. Such evidence as we have (double hearsay with no test of cross-examination of either) indicates that the specified stain was not used on the floor, but the result is acceptable and that it was used on the staircase where the result is not acceptable. However, as set out at some length above, the "deficiency" is, in fact, a defect which is "excessive" and constitutes construction in an unworkmanlike manner.

Thirdly, she said, that the homeowner should fail because he failed to provide specifics of his method of repairs. Through a witness who is a supervisor of the Color Your World company, called by the Applicant, the evidence was introduced that there are now available types of lacquers or varnishes which can be applied over the varnish now on the staircase to change the colour to a desired match with the floors. He said that his company does not make this product and in using it one would have to do a small test area first to see that it was all right, but he said, in his opinion, this method could produce a desirable effect. The Applicant had obtained an estimate from someone who does this work as to its cost, but did not call the witness personally.

Counsel for the Program objected to the admission of an estimate in such circumstances which objection the Tribunal upheld. It is apparent on all the evidence that to recolour the stairs, either such a method must be used, or some method of stripping the present varnish would have to be employed so that the wood could be restained to the proper colour which should have been done as the Applicant sought before the varnish was applied. Counsel stated in failing to provide such specifics, the Applicant failed to prove that a better match of colour could be got by refinishing the stairs.

With respect, the Tribunal does not agree with this. In the first place, as discussed above, the obligation to the Applicant is not simply to make the two match but rather to make them reasonably matched with one another and with the specified colour of ebony. In the second place, the evidence established that the probability is that by using either method, a sufficiently satisfactory match can be got.

Lastly, counsel argued that the evidence, to which I shall refer in more detail later, indicates that the use of this new type of lacquer or varnish over the existing varnish will cost \$4,000 as opposed to \$1,200 to refinish the floors. She said that, while the problem is not trivial, it is not of sufficient consequence to warrant such a greater expense.

The Tribunal does not find this argument persuasive for several reasons. In the first place, since we have found the deficiency to amount to unworkmanlike construction against which a warranty is provided in Section 13(1)(a)(i), the homeowner is entitled to a remedy to fulfil the warranty. In the second place, we do not conclude that the existing varnish will have to be stripped (which counsel for the Program said might run to a cost up to \$15,000) and we do not propose to compensate the Applicant or charge either the builder or the Program with costs excessive in relation to what is to be remedied here.

This brings us to the evidence we have as to costs and to the order which we should make. As aforementioned, counsel for the Program objected to the admissibility of the only evidence the Applicant had as to the cost of a new type of lacquer or varnish, and for the reason given above, the Tribunal did not admit it. From the evidence of the principal of the builder and of the conciliator of the Program and from some statements of counsel for the Program, we have a figure of \$1,200 to refinish the floor, \$3,000 - \$4,000 to recolour the staircase with a lacquer or varnish over the existing varnish, and a much larger amount of between \$5,000 - \$15,000 to strip the whole of the staircase, sand and refinish it with fresh stain or varnish.

In dealing with this question, counsel for the Program said that if the Tribunal were to come to the conclusion that the Program should be ordered to make good the defect other than in the manner offered by it and by the builder, great care must be given to the actual order so that the Program not be required to follow some plan of repairs in the result of which it would have no confidence, or one which might result in costs far outrunning what the situation justifies or, indeed, might be contemplated by the Tribunal when it made the order.

Having all of this in mind, the Tribunal proposes to make an order that the program be required, at its option, either to pay to the Applicant a sum which, upon all of the evidence the Tribunal thinks reasonable to effect the recolouring of the staircase, or to undertake itself the work of achieving this result by whatever means it thinks appropriate.

Accordingly, pursuant to the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal orders that the Ontario New Home Warranty Program, at its option, either

- 1) pay to the Applicant the sum of \$3,500 in full satisfaction of his claim for the defect in the colour of the finish of the staircase and of its failure to match the colour of the finish of the floor, or
- 2) undertake such work as may be necessary to recolour the staircase to be reasonably similar to the finish of the floors, and to constitute the completion of the same in a workmanlike manner.

There is one other matter to be added. There is outstanding between the parties a requirement and undertaking to refinish a small part of the flooring required by reason of some other defects in it. By agreement of the parties, this has stood in abeyance pending the outcome of this appeal so that the work would not be done until it would be known whether all of the floors would be redone and what colour they would be. This now having been determined, the Program should now complete this item in accordance with its undertaking and finish this portion of the flooring in the same fashion as the rest of the floors are finished.

MARK AND CHRISTINA GREEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
SELWYN CHARLES, Member
LOUIS A. RICE, Member

APPEARANCES:
MARK AND C. GREEN, appearing on their own behalf
STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 19 November 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the decisions of the Ontario New Home Warranty Program rendered January 3 and March 19, 1991 to disallow two claims by Mr. and Mrs. Green. The claims were with respect to defects in their home, the whole in breach of section 13(1) of the Ontario New Home Warranties Plan Act.

The first claim was with respect to a sunken garage floor caused by subsidence. The New Home Warranty Program rejected the claim stating that the complaint had not been reported to the Program within the first year of possession and as such was not warranted.

The second claim was to replace a faulty study sliding window. The Program found that the window functioned properly and was, therefore, not warranted.

The first witness to testify was Mr. Mark Green, one of the owners of the home, He paid \$295,952.00 for a home to be built by the builder, Kaneff. He took possession on December 1, 1988. A Certificate of Possession was prepared listing various complaints. All complaints were settled except for the two before this Tribunal.

The complaint with respect to the sliding window in the study was listed in the Certificate of Possession, but not the

complaint with respect to the subsiding garage floor. Mr. Green states that there was no evidence of subsidence of the garage floor at the time possession was taken.

Mr. Green testified first with respect to the garage floor. He is asking that it be replaced because its continual subsidence has resulted in cracking in the masonry along the side of the wall and in the floor itself becoming very concave.

Mr. Green stated that at the beginning he did not realize that problems from the garage were being caused by subsidence in the garage floor. He did, however, complain within the first year, by way of a letter dated September 1, 1989 to the Ontario New Home Warranty Program, that the masonry against the back wall at the floor in the garage was cracked, broken and falling out.

The crack was about 8' long and 20' wide and appeared in the masonry against the back and side wall where the wall met the garage floor. The masonry was the gaz proofing required by the Ontario Building Code and was approximately 2" high. The crack itself was about $\frac{1}{4}$ " to $\frac{1}{2}$ " thick. He testified that some pieces of the masonry began to fall out as a result of the cracking, and that one could remove pieces.

The builder was informed and attempted to repair the problem by filling in the missing masonry. This did not solve the problem, however, and despite trying to repair the masonry on three separate occasions, the masonry continued to crack and fall out.

At first, Mr. Green thought that the problem with the masonry was restricted to the masonry itself. Later on, however, he came to the conclusion that the problem was caused by gradual subsidence in the garage floor. As the floor receded from the masonry, it caused it to crack and crumble. The problem with the masonry, therefore, was a symptom of the subsidence of the garage floor.

He went on to state that although he was only able to identify the problem of subsidence after the first year of warranty, the Program had nevertheless effectively received his complaint within the first year since he had informed it of the symptom.

Mr. Green then produced photographs showing the subsidence in the floor. One could perceive that at the centre of the floor, it had become concave to a depth of $2\frac{1}{2}$ " approximately. As a result, water could not run off the floor but collected at the centre.

Mr. Green testified that he believed that the problem of subsidence in the garage was a problem that was common to the whole lot, as well as the lots of other houses on the street. He stated that the ground in the front area of the lot next to the street began to subside. The builder in 1989 and again at the end of 1991 had to dig up the front area to promote better compaction and, thereby, prevent further subsidence. At that time, the driveway was rebuilt as well. This was done not only for the Greens, but for all other homeowners on the street.

It appears that the material used was fill, which was not properly compacted. As a result, a common problem of subsidence occurred.

In Exhibit 11A and B, one can see subsidence taking place right up to the Green's garage door. Subsidence appears generalized throughout their property. Since the fill went all the way under the garage as well, it would obviously be subject to the same problem.

Mr. Green testified that the problem with the garage floor remained. To repair the masonry problem require replacing the garage floor.

With respect to the sliding window in the study, Mr. Green testified that six of seven sliding windows were replaced. His complaint was of drafts coming through the windows, as well as warpage in three of the windows. He could not understand why the seventh window was not replaced given the fact that it had the exact same problem as three that were; he had first thought it was only an oversight by the Program.

In response to a question by the Tribunal, Mr. Green stated that the track and sash of the other six windows were also replaced.

In cross-examination, Mr. Green stated that when it rains towards the garage door, water penetrates into the garage and runs to the centre of the floor. With respect to the masonry gas proofing, he said that it connected the floor to the wall. It sat on the floor and rested against the wall and was in a mortar like material. He testified, as well, that he used the garage as little as possible because of the problems with it.

With respect to the study window, he testified that the original window manufacturer had gone bankrupt. He went on to state that the replacement windows were different from the original ones in that they were not spring loaded and were better sealed.

The next witness was Christina Green, who corroborated the testimony of her husband.

The New Home Warranty Program then proceeded to make its defence. Their first witness was Randy Baryla, the assistant service manager of the builder. He testified that he had dealt with the problems raised by the Greens and had been to their home at least twenty times. The last time was in February 1991 at the reinspection by the Program.

With respect to the problem with the study window, he testified that he had no specific knowledge of it and did not remember whether he had even inspected the windows.

With respect to the garage floor, he testified that the garage had concrete walls and a floor slab. The drywall went down to the slab and a masonry strip went along the base of the drywall. It was made of brick mortar troweled against the wall and sitting on the floor.

He testified that he had not reinspected the masonry strip since its first repair sometime in 1990. The Tribunal notes that the evidence of Mr. Green clearly establishes that repairs have been made since then on at least two other occasions and that the testimony of Mr. Baryla with respect to this problem is, therefore, of limited value.

Mr. Baryla went on to state that the front lawn and driveway of the Green property had been repaired because of subsidence and sediment. The last repairs were done in October 1991, just a month before the hearing of the case by this Tribunal. The problem of subsidence was most proximate to the garage door.

In cross-examination, Mr. Baryla stated that he had seen cracking in the masonry and that the masonry itself had deteriorated. He did not remember anything more specific, but acknowledged that repairs were done because there was a problem.

He also had noticed that repairs had been done on the lawns and driveways of other lot owners on the street because of the same subsidence problem.

Mr. Baryla was asked about the quality of repairs done to the masonry strip. His opinion was that they had been done in a workmanlike manner. The Tribunal, however, in looking at the photographs taken of the repairs, believes that the quality of workmanship was very poor.

When asked why the builder refused to make any further repairs to solve the problem, Mr. Green stated that it was because the Program had refused to accept the Green's claim with respect to the garage floor. The builder treated that refusal as being sufficient reason for it to not proceed any further as well.

He also testified that he did not know and did not have the expertise to know what would happen to the masonry around the wall if the floor began to subside.

The final witness was Ms. Myrna Morris, a conciliator with the New Home Warranty Program. She testified that she had inspected the masonry gas strip in November, 1989 and saw that it was cracked and that certain pieces had come out. Other pieces could also be pulled out. The mortar itself had deteriorated.

She ordered the builder to carry out repairs which subsequently failed. She then ordered that caulking be carried out which also did not succeed.

She testified that there was cracking at the floor joint as well as higher up and that the cracks were wide, running horizontally and vertically. She thought that the gap of the crack could be $\frac{1}{4}$ " wide although she did not measure it.

She had observed that the garage floor had subsided towards the centre of the slab and did not doubt that the floor was $2\frac{1}{2}$ " deeper at the centre of the slab than at the borders.

With respect to the sliding window in the study, she had observed the problem complained of and asked Mr. Richter her superior in the Ontario New Home Warranty Program to check the problem as well in February 1991. Mr. Richter reached the conclusion that six of the seven windows should be replaced, but not the one in the study which he felt was in satisfactory condition. She went on to testify that when she told Green about this conclusion, he agreed with the decision to only replace six windows. She was, therefore, very surprised to find out on November 13, 1991 that the seventh window was still at issue. She stated that she had had absolutely no indication that Mr. Green had not agreed with Mr. Richter's decision at the time of their meeting. She went on to state that she had not confirmed in writing this alleged acquiescence by Mr. Green.

In cross-examination, with respect to the sliding window in the study, Mr. Green produced Exhibit 13, a letter dated April 5, 1991, and sent by fax to the New Home Warranty Program. Ms. Morris admitted receiving that letter April 5, 1991.

As appears on page 2 of the letter in item 8A, Mr. Green wrote that:

With respect to the sliding windows, all were mentioned but the one in the study. As the same problems were evident with that unit should it not be replaced as well? (Was this just an oversight?)

When asked whether Mr. Green had not objected immediately to the decision by Mr. Richter to not replace the window, Ms. Morris stated that she had received the letter and a copy of it would have gone to Mr. Richter as well. She did not remember item 8 and that was why she was under the impression that that issue had been settled.

When asked whether the problem of the fill would cause subsidence under the garage at the same time as on the other parts of the property, the witness testified that the subsidence would take place at the same rate throughout the property.

The Tribunal notes that the problem of subsidence was first observed in 1989 within the first year of the warranty and that, therefore, the subsidence in the garage would have begun in 1989 as well.

Ms. Morris also stated that the problem with the masonry strip could have been caused by the subsidence in the garage floor. In any case, she would expect the subsidence to aggravate the problem.

Having heard all the testimony and reviewed the exhibits produced, the Tribunal finds as follows:

1. The garage floor complaint - The Tribunal finds that the subsidence of the garage floor must have begun at the same time as the subsidence of the other parts of the Green property. The land fill throughout was the same and, therefore, the problem of subsidence would manifest itself throughout the property. The problem with the garage floor, therefore, would have begun in 1989, within the first year of possession of the home by the Greens.

The ability of the Greens to realize at the beginning that the problem with the garage was subsidence of the garage floor rather than the masonry gas strip being improperly constructed would be almost impossible. The concrete floor would hide the appearance of the problem.

The Tribunal finds that the problem in the masonry gas

strip was a manifestation of the problem of the subsiding garage floor slab. As the floor sunk, cracking would occur in the masonry gaz strip. This cracking was, therefore, a symptom of the actual problem, viz., the sinking garage floor.

It was held in the York Condominium case that if the homeowner complained about the symptoms of the problem without specifying the problem itself, this constituted sufficient notice to the New Home Warranty Program and was, therefore, a complaint filed within the one year warranty period.

It was only through the repeated unsuccessful attempts to repair the masonry, that the homeowner was able to discover that the problem was not in the masonry itself, but rather the sinking floor.

Since the Greens complained of the problem to the Program within the first year, they are entitled to have their floor replaced and new gaz proofing installed.

2. Sliding window in study - The Tribunal finds that the testimony of Mr. Green is more credible than that of Ms. Morris with respect to his alleged acquiescence to the New Home Warranty Program's decision not to replace the study window. The Tribunal finds that there was no agreement between the Program and Mr. Green in this regard. As to the claim itself, the Tribunal finds that the sliding window in the study should also have been replaced at the same time as the other six windows. It is clear from the evidence that drafts of an abnormal nature penetrate through the window. This obviously would add to the health costs of the home and would make the room uncomfortable on cold days.

Since the Program replaced three windows with an identical problem, the Tribunal sees no reason why it failed to also replace the window in the study. The bankruptcy of the window manufacturer might also explain the poor workmanship in the windows and their installation.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claims of the Greens. The Program is ordered to replace the garage floor and to install a new gaz proofing strip in the garage. The Program is also to replace the sliding window in the study with a window similar to the six sliding windows previously replaced.

JAMES AND ANNE-MARIE HAMILTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman presiding
J. BEVERLEY HOWSON, Member
ALBERT LONGO, Member

APPEARANCES:
JAMES HAMILTON, appearing on their behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 4 January 1991 Toronto

REASONS FOR DECISION AND ORDER

This is a decision in the Mr. and Mrs. James Hamilton claim for damages against the Ontario New Home Warranty Program in which the Program disallowed the claim by its decision dated May 1, 1990.

The homeowner's claim against the Program relates principally to the brickwork of the home constructed at 118A Eastville Avenue, Scarborough. There is a secondary claim for an uneven garage floor.

The facts of this claim are that the Hamiltons by Agreement dated February 10, 1987 agreed to purchase the dwelling to be constructed. They took possession on September 4, 1987 and at that time completed a Certificate of Completion and Possession. In that Certificate of Completion and Possession, there was no reference to the brickwork or the garage although there was reference to the fact that there was no garage door installed. Subsequently by letter of June 17, 1988, the Hamiltons through their solicitor filed a complaint with the Program in which 5 items were identified as follows:

1. Brickwork needs to be cleaned of splattered mortar.

2. Cracks in the wall need repairing (front of house).
3. Pointing of bricks has been partially done but some drain holes have been filled in on the north wall.
4. Bow in north wall.

In addition, reference was made to water draining into the garage and pooling around the wood door supports.

Subsequently, the matter went to a conciliation held September 14, 1988. In that Conciliation Report, the Program identified warrantable items as:

1. Brickwork needs to be cleaned of splattered mortar.
2. Cracks in the wall need repairing.
3. Pointing of bricks partially done.
4. Water draining into the garage.

The Program noted that the surface of the poured concrete garage floor sloped in an upward direction indicating that the floor was concaved approximately 1/2" just inside the opening which the Program considered to be excessive and the builder responsible to correct.

The Program did not allow as a warranted item, the bow in the north wall as it was not considered excessive enough to warrant repair.

The Program re-inspected the property on February 21, 1989 and identified the following matters as not having been completed by the builder in an acceptable manner:

1. Splattered mortar still remaining on brick.
2. Crack in mortar joint of brick quoin on north wall is not done.
3. Pointing of bricks attempted by using a different coloured mortar.
4. Also many voids in mortar were not done.

5. Garage floor repair attempted but unacceptable.

Further re-inspection occurred on April 11, 1989 in which the Program identified that the items referred to previously were still incomplete.

Subsequently, the Program engaged contractors to effect repairs. Mr. Perryman of the Program met with the Hamiltons on July 21, 1989 and Mr. Hamilton in his evidence identified the fact that certain joints had been repointed, new mortar had been put on, the weep holes had been unplugged and the voids filled. He also pointed out that it had been suggested by the Program that a seal and sweep be attached to the garage door to alleviate the entrance of water into the garage. Mr. Hamilton, however, felt that the problem was not with cutting the door to fit the floor but to correct the floor.

Mr. Perryman, in his evidence, indicated he was of the view that after the remedial work had been done to the brickwork, that the brickwork was in a satisfactory state and in compliance with the Building Code. He indicated that he had inquired of the Hamiltons if any work order from the Municipality had been issued regarding Ontario Building Code violations. On being advised that none had been issued, he was of the view that there had been no violation of the Building Code.

He also indicated that the Program would be prepared to re-grind the garage floor which had been identified as a problem in the original Conciliation Report and which both parties acknowledge has not been corrected.

Mr. Hamilton submitted to the Tribunal that the brickwork should be corrected in view of the warranty contained in Section 13(1)(a)(iii) in that the brickwork was not constructed in accordance with the Ontario Building Code. In support of this claim, Mr. Hamilton made reference to subsection 9.20.4.1 of the Ontario Building Code which reads as follows:

Maximum average joint thickness shall be
12 mm. Maximum thickness of an individual
joint shall be 20 mm.

He produced photographic evidence which identified several joints which exceeded the 20 mm. thickness. In the report which he filed with the Tribunal, however, it was pointed out by his consultant that, in fact, the walls are of brick veneer with

wood stud load-bearing framing. The report also indicated that the load-bearing capacity of the outside walls was dependent upon the wood studs.

In response, the Program indicated that while Mr. Hamilton had complained from time to time of mortar, no specific objection under the Ontario Building Code had been raised until this hearing and, in fact, there had been no work order applied against this house by the Municipality for breach of the Building Code. In addition, the Program submitted there had been no damage proven by Mr. Hamilton with respect to the breach, if any, of the Ontario Building Code.

The Tribunal is of the view that because the purported infraction of the Building Code has not been raised within one year and in view of the fact, no damages have been shown to have arisen, the Program was correct in disallowing the claim with respect to the brickwork.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal confirms the disallowance by the Ontario New Home Warranty Program of the claim by Mr. and Mrs. Hamilton with respect to the brickwork of the residence.

With respect to the garage floor, however, this is an item identified in the Conciliation Report and both parties acknowledge that it is not yet completed. Therefore, by virtue of the authority vested in it under the Act, the Tribunal does hereby direct the Program to level the floor by grinding or whatever other corrective means may be appropriate or in the alternative, if the Program and the homeowner can agree on some combination of adjustment to the garage door and levelling of the floor, then the Tribunal directs the Program to complete such work.

5. Garage floor repair attempted but unacceptable.

Further re-inspection occurred on April 11, 1989 in which the Program identified that the items referred to previously were still incomplete.

Subsequently, the Program engaged contractors to effect repairs. Mr. Perryman of the Program met with the Hamiltons on July 21, 1989 and Mr. Hamilton in his evidence identified the fact that certain joints had been repointed, new mortar had been put on, the weep holes had been unplugged and the voids filled. He also pointed out that it had been suggested by the Program that a seal and sweep be attached to the garage door to alleviate the entrance of water into the garage. Mr. Hamilton, however, felt that the problem was not with cutting the door to fit the floor but to correct the floor.

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The Tribunal is of the view that because the purported infraction of the Building Code has not been raised within one year and in view of the fact, no damages have been shown to have arisen, the Program was correct in disallowing the claim with respect to the brickwork.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal confirms the disallowance by the Ontario New Home Warranty Program of the claim by Mr. and Mrs. Hamilton with respect to the brickwork of the residence.

With respect to the garage floor, however, this is an item identified in the Conciliation Report and both parties acknowledge that it is not yet completed. Therefore, by virtue of the authority vested in it under the Act, the Tribunal does hereby direct the Program to level the floor by grinding or whatever other corrective means may be appropriate or in the alternative, if the Program and the homeowner can agree on some combination of adjustment to the garage door and levelling of the floor, then the Tribunal directs the Program to complete such work.

MR. AND MRS. JOSEPH HARWOOD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES G. LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:
JOSEPH HARWOOD, appearing on their behalf
STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 10 October 1991 Timmins

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Joseph Harwood took possession of 793 Reg Pope Boulevard, Timmins on June 30, 1987. This was a new home and they were the first owners having ordered it to be built by Cy Rheault Construction Ltd.

Some two years later, they noticed a series of brownish yellow spots appearing on the vinyl tile throughout the bathroom hall and dining room areas which began to spoil the appearance of the formerly pure white tile. They brought this to the attention of the builder who apparently advised them it should be warranted, but he could do nothing about it. As a result on September 4, 1990, Mr. Harwood wrote the following letter to the Ontario New Home Warranty Program and filed a Proof of Claim for \$5,000:

New Home Warranty Program
1899 Lasalle Blvd.
SUDBURY, Ontario
P7A 2A3

September 4, 1990

Re: New Home Warranty
#003-0007-1702
793 Reg Pope Blvd.

Timmins, Ontario
Purchasers: Joseph and Jeannine Harwood
Vendor: Cy Rheault Construction Ltd.

Dear Sir or Madam:

I understand the New Home Warranty Program covers substandard workmanship and defective materials, that have been discovered by the vendor after one year following the first date of possession but prior to the fifth year of possession.

In this regard, I would now make claim to exercise our rights to the Warranty Program to correct such deficiency in the flooring of our residence.

This matter has been reviewed with a representative of the vendor. The representative is in agreement that the deficiency in the flooring of our residence exists. The reason appearing to be defective materials.

As the initial one year liability on the vendor had been exceeded, it has been suggested that our recourse is to make claim to our warranty rights under the New Home Warranty Program.

I trust on receipt of this correspondence, an agent of your office shall be assigned to assess our claim.

Anticipating immediate action shall be taken to resolve this matter.

Yours truly,

Joseph Harwood
phone (705) 268-1084

The Program replied that this was a claim which will properly belong within the first year and therefore, the warranty had lapsed. Mr. Harwood now appeals to this Tribunal for relief on the grounds that it was a latent defect which could not be detected within the first year of the warranty.

The only issue before this Tribunal, therefore, is whether or not the defect falls within the definition of a major structural defect with its five year limitation.

In his evidence, Mr. Harwood pointed out that the cause of the stain was the reaction of resin to certain glues which eventually result in the stain coming through the tile and the white flooring in some places appeared to be stained yellow. He said it takes a considerable time for this to appear and could not possibly be noticed during the first year of occupancy. Mr. Harwood contended that it materially affects the use of the house and, therefore, falls within the category of a major structural defect. He filed a quotation sheet, Exhibit 4, presented to him by Master Carpets which assessed the laying of a new floor at \$4,910.15. The quotation bears a footnote "Plywood patches - glue has telegraph through cushion floor causing yellow spots all over".

The premises were inspected by the Program's conciliation officer, Robert Plourde whose observation was as follows:

At the time of inspection, it was observed that there was some noticeable yellow spots on the linoleum in the dining area and main entrance. Spots were less noticeable in the kitchen and none in the bathroom.

These yellow spots are commonly known as boat patching. This is a first year warrantable item and cannot be considered a major structural defect.

To succeed in his claim, Mr. Harwood must bring it within the five year warranty under section 1(o) of Regulation 726 of the Ontario New Home Warranties Plan Act which reads as follows:

"major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials...

Since no other evidence has been offered by the parties, this Tribunal must find on that which is before us and we are unable to agree with the appellant that his claim falls within this definition set out in the Act. There is no evidence that leads us to conclude the stains materially or adversely affect the use of the premises for the purpose for which it was intended. It is conceded there is some discoloration of the tiles, but neither does it prevent their normal use nor preclude the areas from being occupied for their intended purpose. The effect is purely cosmetic and it is clear from the Act and the many cases decided by this Tribunal that an aesthetic deficiency cannot be considered a major structural defect.

On all the evidence, therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

HERBER HOLDINGS LTD.

APPEAL FROM A PROPOSAL THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES: CAROL A. STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 4 November 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a Notice of Proposal set out in a letter from the Ontario New Home Warranty Program to the Applicant dated May 25, 1990, whereby the Registrar of the Program proposed to refuse to renew the Applicant's registration for the reasons that:

1. Pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, (the "Act"), the Registrar finds that you have failed to provide the security required with respect to the construction and sale of houses, requested of you by letter(s) dated April 30, 1990.
2. Pursuant to the provisions of Section 8(2) of the Act, you are in breach of a condition of registration, TO WIT:
 - (a) You have failed to comply with subsections 5 and 6 of Regulation 728 and Section 10(3), Part 3 of Regulation 726, requiring you to furnish such documentation as the Registrar may require and request and which was requested of you in paragraph 1 above.

When the matter came on for hearing before the Tribunal, the only party which appeared was the Ontario New Home Warranty Program, represented by counsel. Exhibit #2 filed at the hearing, an affidavit of service, established that the Applicant had been properly notified of this hearing. Both counsel for the Program and the Registrar advised the Tribunal that Mr. Pawelowski, on behalf of the Applicant, had telephoned on Friday, November 1, 1991 to each of them and advised that no one would be attending this hearing on behalf of the Applicant. Counsel for the Program asked for an Order that the Registrar's Proposal be carried out.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to carry out its Proposal.

HIGH NORTH HOLDINGS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRUBUNAL:

JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:

STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 8 October 1991

REASONS FOR DECISION AND ORDER

The Tribunal determines as follows:

1. The Applicant was sent by registered mail the Appointment for and Notice of Adjourned Hearing dated the 16th day of May, 1991 as evidenced by Exhibit 7, which stated:

...hearing will be held...before the
Commercial Registration Appeal
Tribunal in Conference Room 3 at the
Senator Hotel, 14 Mountjoy Street
South, Timmins on Tuesday, October
8, 1991 at 9:30 o'clock in the
forenoon...

which contains the further notice:

...If you do not attend at the
hearing, the Commercial Registration
Appeal Tribunal may proceed in your
absence and you will not be entitled
to any further notice in the
proceedings.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to carry out his Proposal.

ART HOLOWACHUK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
GORDON R. DRYDEN, Vice-Chairman as Member
D.H. MACFARLANE, Member

APPEARANCES:
ART HOLOWACHUK, appearing on his own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 30 September 1991 Toronto

REASONS FOR DECISION AND ORDER

In view of the representations made by the parties, the
appeal by the Applicant is dismissed.

R.A. HUNT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
JAMES GRAY LESLIE, Vice-Chairman as Member
WILLIAM WATSON, Member

APPEARANCES:

RON A. HUNT, appearing on his own behalf

STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 20 November 1991

Ottawa

REASONS FOR DECISION AND ORDER

This is a claim by Ron A. Hunt for damages against the Ontario New Home Warranty Program in which a builder failed to complete the contract with Mr. and Mrs. Hunt. Pursuant to claims submitted by the Hunts to the Warranty Program, an inspection occurred and certain claims were accepted and settled between the Program and Mr. and Mrs. Hunt. The claims which are outstanding at this time as asserted by Mr. and Mrs. Hunt before the Tribunal total \$4,018.99 and are made up as follows:

1) \$948.99 for electricity which was used by the contractor in the course of building the house and which electricity charges he did not pay and accordingly such charges were added to the owner's tax bill by the municipality;

2) \$300.00 for fire and theft insurance being the portion which the Hunts claimed the builder should have paid for such insurance for the period resulting from the delay in closing until the Hunts took occupancy of the home;

3) \$270.00 for commuting costs which the Hunts incurred in transporting their children to schools resulting from the delay in closing;

4) \$2,500.00 being the amount reduced by the Program from the Hunt's claim on the basis that it was a development cost for

which the Hunts were obligated under the building contract.

The construction contract for the building of a new home on a lot owned by the Applicants was drawn by the builder and there were some written additions by the Applicants. No solicitor was consulted with respect to the contract. The contract was entered into on August 24, 1988, for a contract prize of \$238,400 with an optional addition of \$17,000 for a cedar shake roof if required by the owners.

With respect to closing, the contract provided as follows: "Approximate closing date - November 30, 1988". The contract called for progress payments totalling \$175,000 with a balance on completion or possession. Evidence was given that the option for the roof was exercised by the owners and that as a result, \$192,000 was paid to the builder leaving a balance owing under the initial contract, with the option have been exercised of \$63,400. The uncontradicted evidence was that the builder had "drifted away" from the project by mid-February 1989. A claim was submitted by the Hunts formally to the Program April 20, 1989, showing a contract base of \$257,900 being the amounts of the basic contract, plus the cedar shake option plus a \$2,500 City of Gloucester development fee.

The claim stipulated that in addition to the \$192,000 paid to the builder, further payments were made by the Applicant in the amount of \$22,527. There were additional estimates for uncompleted items of \$24,660 and deficient items estimated to amount to \$6,710. These amounts total \$245,897 thus showing a balance owing on the contract price unpaid to the builder as being \$12,003. The Applicant also noted that construction liens had been placed against the property.

In a subsequent claim dated December 21, 1989 being the final claim filed by the Applicant with the Program after inspections and reports had occurred, the Applicant listed further adjustments including the four items which are the subject matter of the claim before this Tribunal, such adjustments totalling \$16,318.99. In deducting these items from the contract price which the Applicant reduced to \$255,400 (eliminating the City of Gloucester development fee), the Applicants came to a building contract price of \$239,081.01. After deducting payments to the builder of \$192,000.00, completion costs of \$22,077.24, Program estimates for completion amounting to \$27,560.00 and lien holder's payments of \$26,200.00, the Applicant asserted a claim against the Program for \$28,756.23.

It was acknowledged in evidence by the Applicant that he was obligated to have held back from the progress payments 10% or

\$19,200 as provision for construction liens. Counsel for the Program, therefore, submitted that the only amount which should be allowed for construction liens to the Applicant was the difference of \$7,000 rather than the full \$26,200 claimed. Whether the Applicant may have a claim against other parties in respect to advice in this regard is not for this Tribunal to decide. We must only deal with the propriety of the claim against the Program.

The Applicant confirmed that the builder had performed work to a value of \$192,000 before abandoning the project and the Tribunal, therefore, considers that the Applicant should have held back \$19,200 from the progress payments made by him. He, therefore, cannot claim against the Program those amounts which except for his own act would have been available to satisfy his obligations as an owner in respect to lien claimants under the Construction Lien Act.

Accordingly his claim against the Program for both completion costs and deficiencies must be reduced by that amount to \$9,556.23 in which amount is included the four claims totalling \$4,018.99 asserted in this application. In fact, the Program paid to the owner as acknowledged by him before the Tribunal, the sum of \$24,737.24, an amount equal to \$15,181.01 more than that to which the Applicant was entitled. This amount was paid in March of 1990.

A further amount of \$12,960 was paid to the homeowner in August 1990 by the Program. This latter amount was acknowledged by both the Applicant and the Program representative as additional warranty claims.

It is not disputed that the Applicant has received from the Program amounts totalling \$37,697.24, an amount over and above the \$63,400 not paid by the Applicant under the contract with the builder. The Applicant, therefore, had the sum of \$101,097.24 to work with in completing the home and curing the warrantable defects. He incurred the following expenses: \$12,960.00 for supplemental warranty items; \$7,000.00 for properly payable lien payments as found by this Tribunal in these proceedings; \$22,077.24 for completion costs; \$16,318.99 for expenses additionally incurred including the amounts claimed in this application and \$27,560.00 estimated additional completion costs for a total of \$85,916.23 or \$15,181.01 less than the money available to him. It is to be noted that the Program is not asserting any claim for reimbursement of this amount from the Applicant. On this basis, the Applicants cannot show that they have suffered any compensable claim for damages for financial loss under the provisions of Section 14(1)(a) of the Act.

It would also appear in the course of the hearing that there may be a further \$500 refundable fee to which either the Applicant or the Program may be entitled from the City of Gloucester Building Permit department.

Notwithstanding that the Applicant has failed to prove any financial loss by reason of the foregoing and, in fact, in the opinion of the Tribunal has been compensated for the four claims asserted by the Applicant as they are included in the claims allowed by the Program, a number of issues were raised by both the Program and the Applicant in respect of the four individual items under appeal to which the Tribunal feels obligated to respond.

The first claim for electricity was disallowed by the Program on the basis that section 14(1) consists of three subsections. Clause (a) permitting a "person" to recover a claim for financial loss for the failure to perform a contract by the vendor; clause (b) giving an owner, a defined term in the Act, a claim for breach of warranty and clause (c) giving an owner a claim for major structural defect.

The Program took the position that the Applicants, having become owners, were now excluded from the provisions of clause (a). In looking at the limits under the Regulations, the Program ruled that since the Applicants were excluded from the provisions of clause (a) section 14 of the Act, they could only rely upon section 6(6) of the Regulations which stipulates that liability is limited to damage to the home only and no other liability for any other damage, direct or indirect.

The Applicants argued that while it is true they are an owner under the terms of the Act, they are also a person which is not a defined term and that section 14(1)(a) of the Act is much broader than clauses (b) and (c), in that it would encompass not only a person who fails to become an owner, but would also encompass an owner since they are persons who have entered into a contract with a vendor. If that, in fact, is the case, then the Applicants would have a claim under clause 6(1) of the Regulations if they could show a financial loss.

The Tribunal is of the view the position of the Applicants is correct and that if the Applicants could have shown that they had suffered financial loss, their claim for this item would have properly been allowable. In any event, the Program acknowledged at the hearing before the Tribunal that they would accept this claim.

With respect to the second claim for insurance costs and the third claim for commuting costs, these claims are both asserted

by the Applicants on the basis of the delayed closing provisions under the Regulations to the Act. With respect to the insurance costs, the Applicants asserted that because the home was not completed on November 30, 1988, the owners had to pay additional insurance which otherwise would have been covered under their policy of insurance for an occupied house. Similarly, because the closing did not occur on November 30, 1988, commuting costs were involving in transporting their children to school.

The Program denied this claim on the basis that the Applicants' contract was only for the building of the house because the Applicants owned land and that such a building contract does not fall within the criteria of a delayed closing since the closing does not occur; only occupancy occurs. While the wording in section 19 of the Regulation is rather confusing in that it makes reference to a date originally fixed for closing in the purchase agreement, nevertheless, the opening words of section 19 do provide for compensation by a vendor. "Vendor" being a defined term would apply to the builder in this particular situation. If, in fact, therefore there had been a delayed closing, these items would have been compensable. The wording in the Regulation section 19(1)(a) refers to "the date originally fixed for closing a purchase agreement" (emphasis added). The provisions in the building contract provided for an approximate closing date. In the view of this Tribunal, an approximate date cannot be the date referred to in section 19(1)(a) of the Regulations. The contract does not provide that time is of the essence and it is well settled law that in such circumstances reasonable notice must be therefore given to the parties to the contract. There not being a fixed date for closing and no notice given by either party to the contract in writing, the Tribunal is of the view that these claims are not assertible.

With respect to the final claim, the Program took the position that under the provisions of paragraph 1 of the contract "development fee is owner's responsibility" applied to the City of Gloucester development charges. The Applicants on the other hand drew to the attention of the Tribunal the opening words of paragraph 1 of the contract which provided that the contractor was responsible for securing and paying "for all permits". In the evidence presented to the Tribunal on this hearing, it was shown that the Regional Municipality of Ottawa-Carleton had a regional development charge. Evidence also indicated that the City of Gloucester would not issue a building permit until a Certificate of payment of the regional development charge had been filed with it. It appears that in fact the developer had paid or the region had waived payment of a regional development charge on this property.

The City of Gloucester provided a letter with respect to the issuance of the Building Permit identifying that the builder had paid the following fees to obtain the Building Permit:

Application fee	\$ 500.00
Balance of permit fee	1,412.50
Performance deposit	500.00
City development charges	<u>2,500.00</u>
	\$4,912.50

The letter also went on to say that the builder had provided the municipality with the required copy of the Regional Development charge payment certificate prior to the issuance of the Building Permit. The Applicants' position was that the City of Gloucester development charges were part and parcel of the issuance of the Building Permit and that the contract referred to only one development fee and that the contemplation of both of the parties was that that fee was the regional fee. In support of his position, the Applicant gave evidence that no claim was ever asserted by the builder from the date of the contract in August 1988 until the builder abandoned the contract in February 1989 for payment of the City of Gloucester development charge.

The Tribunal finds that the wording in the contract is ambiguous. On the other hand, it refers to a fee in the singular and the evidence was that the owner applied for and obtained the certificate of payment of that regional development fee.

The Tribunal is also of the view that if there is any ambiguity then that ambiguity must be read against the drafter of the agreement, namely the builder. Under the circumstances, therefore, it is the opinion of the Tribunal that the disallowance of this item by the Program was not appropriate.

Having reviewed, however, all of the issues in this matter and noting that the Applicants have in fact been overcompensated, the Tribunal finds that there are no damages proven by the Applicants which can be asserted against the Program.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal confirms the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicants herein.

SOPHIE JAREMKO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
D.H. MACFARLANE, Member

APPEARANCES: SOPHIE JAREMKO, appearing on her own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 12 February 1991

Toronto

REASONS FOR DECISION AND ORDER

The facts of this case are that on January 30, 1989, the Applicant Sophie Jaremko took possession of Unit 104 in the building located at 1 Aberfoyle Crescent in Etobicoke. At that time, the Applicant signed a Certificate of Completion and Possession identifying a number of matters but the matter in contention was not so listed, it being contended that the problem arose subsequent to the closing by actions of unidentified persons.

Ms. Jaremko testified that she had blinds installed by her own contractor who entered the premises to measure and subsequently entered the premises to install blinds on February 9, 1989. Ms. Jaremko testified that she inspected the installation of the blinds subsequently and at that time, she had not noticed any stain on the broadloom. She further testified that the next occasion at which she attended at the unit was on April 12, 1989, when she took a prospective tenant to look at the premises. On that occasion, she noticed three yellow stains on the broadloom, two in the living and dining room area, and one in a passage way to the bathroom. She also indicated that the painting of the apartment had been completed by this time, but was rather vague in her evidence as to when that had been done.

She further testified that she only went into the apartment on a frequency of about once every three weeks and, in any event apparently had not been in the apartment from the period

of February when the blinds had been installed and inspected by her until April when she went in with the prospective tenant.

A witness for the builder, Dennis Paccagnella, had testified that he was in charge of finishing the units in January of 1989 and that while they were vigorously painting, the painting was still somewhat incomplete by January 30, 1989. He testified however, that the painting was completed within the next few days and in any event prior to the date on which the contractor for Ms. Jaremko installed blinds on February 9, 1989.

Mr. Amadeo Bernardi, for the builder, gave evidence that he started his employment with Shipp Construction in September 1989, and first met Ms. Jaremko on October 13, 1989, when she attended at his office to inform him that the work on the Certificate of Completion and Possession had not been completed.

Mr. Bernardi indicated that he was shocked that it had not been done, but both he and Ms. Jaremko acknowledged that because this unit was known to be unoccupied, all pressures to complete units were directed to those units which were to be shortly occupied or already occupied. Nevertheless, he indicated that he gave instructions that the work required to be done would be done as quickly as possible and on the evidence of both Mr. Bernardi and Ms. Jaremko, it would appear that all of the matters were rectified during January or February of 1990. The one item, of course, which had not been rectified to the satisfaction of Ms. Jaremko was that of the stain on the carpet.

Ms. Jaremko made much of the fact that having complained in the Spring of 1989, the builder had shampooed the carpet as indicated in the notice left in the apartment dated June 20, 1989. There was further indication that the builder shampooed the carpet on two subsequent occasions. The builder denied that it had any liability for these stains, but that as a matter of goodwill and in order to achieve customer satisfaction, it had undertaken to try to satisfy Ms. Jaremko by cleaning the broadloom. The Tribunal is satisfied that no liability was being acknowledged by the builder by the simple fact of its attempt to clean the carpet. In fact, in the photographic evidence presented to the Tribunal, there was no evidence submitted with respect to the area outside the bathroom and the photographic evidence with respect to the carpeting in the living/dining room area was inconclusive as to the continued presence of any yellow stain. In fact in her evidence, Ms. Jaremko acknowledged that there was not much stain remaining, if any, but that her principal concern was that because of the shampooing, the carpet in the two areas in the living/dining room area were now matted and looked different from that appearance of the balance of the carpeting.

This Tribunal is of the view that its responsibility is not merely to assign blame, but also to determine if the complaint is warrantable under the statute.

In examining the warranty, therefore, under Section 13 of the Act, the Tribunal must determine whether the stain is a defect caused by faulty workmanship and, secondly, was it caused by the builder? The burden of proof is upon the claimant, Ms. Jaremko to show that either the builder caused the damage or the preponderance of evidence is that the builder did so. In view of the fact that this stain occurred subsequent to the closing at which time Ms. Jaremko had possession of the unit, a substantial burden is placed upon Ms. Jaremko to show a direct relationship between the stain and the builder.

The facts that Ms. Jaremko had a worker in the unit, the evidence of the builder that no work had been done in the unit subsequent to closing other than the completion of the painting which appeared to have been finished prior to the discovery of the stain, and the fact that Ms. Jaremko was only in the unit on an infrequent basis, makes it very difficult to show either directly or by a preponderance of evidence that the builder caused the stain, and the cleaning efforts of the builder did not in any way prevent the builder from disclaiming responsibility.

The decision of the Ontario New Home Warranty Program in its letter of June 22, 1990, was as follows:

The Warranty Program cannot determine who caused these stain marks; the marks were not noted on the Certificate of Completion and Possession. After reviewing all of the facts, it is the Warranty Program's decision that the broadloom stains are not a warrantable item as defined.

The burden of proof being upon the Applicant and that burden not having been satisfied because of the facts recited in this decision, pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal confirms the decision of the Ontario New Home Warranty Program.

JETNY HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
JOHN HURLBURT, Member

APPEARANCES:
JOHN SARACO, its agent
CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 10 June 1991 Toronto

REASONS FOR DECISION AND ORDER

In this matter the Registrar refuses to renew the licence of the Appellant Builder pursuant to section 9(1) of the Ontario New Home Warranties Plan Act on the grounds that the builder failed to acknowledge or comply with the conciliation reports, failed to repair items found to be warranted and, inter alia, failed to reimburse the Program for monies paid out by it to complete or repair warrantable deficiencies.

The claims arise from conciliations on two residences, White and Ritter, but since the builder has acknowledged there is a liability to the Program of \$833.75 with regard to the White home, we will deal only with the Ritter residence.

Ritter was the second owner of the house taking possession on July 3, 1987. The previous owner had taken possession in February 1987. On November 25, 1987 the first complaint was received by the Program of flooding in the basement. James Hunter, Conciliator for the Program attended an inspection on April 18, 1988 and the builder was subsequently given a copy of the Conciliation Report. Ritter, on October 7, 1988 again notified the Program that the leaks in the basement had still not been addressed by the builder, although the four other items in the report had been completed.

A further inspection by the Program disclosed on November 21, 1988 that there were water leaks in the several areas of the basement. The builder was again notified by the Program of the

reinspection and its findings, but did not take the necessary steps to effect the repairs.

On December 22, 1988 the Program advised the builder by letter that if the repairs were not completed by January 15, 1989 it would either make a cash settlement to the owner or have them completed by other contractors and all costs incurred would be invoiced to the builder. A further notice to the same effect was directed to the builder on January 12, 1989.

Since no action had been taken by the builder, Ritter, on February 23, 1989, sent four estimates he had received for the completion of the repairs. They were as follows:

Don Valley Restorations	\$4,800.00
Reliable Restorations	\$4,950.00
Complete Home Inspections	\$5,150.00
Perma Limited	\$4,000.00

The Program however, considered each of the estimates too high and engaged its own contractors, R.S.J. Construction & Maintenance, at a price of \$3,975.00. The work was thereupon completed by R.S.J. Construction and since Ritter was apparently satisfied, he signed a release on September 5, 1989 absolving the Program of further liability.

Jetny Homes was subsequently invoiced for the completed work in the sum of \$3,975.00, together with the 15% administration fee of \$596.25 for a total of \$4,571.25.

Quite apart from this builder's failure to complete the warranty on the Ritter home, there is evidence of the Program having issued four notices of Proposal within a period of four years. The company's delinquency is obvious and continuing. We find as a fact that the builder was in breach of warranty under section 1, subsection (3) of Regulation 728 and further, that it has failed to indemnify the Program in the sum of \$833.75 concerning the White residence and \$4,571.25 regarding the Ritter home making a total of \$5,405.00. Ms. Street, counsel for the Program has asked for an Order against the builder for the repayment of \$5,405.00 to the Program and it is hereby so Ordered.

She further asks that the builder deposit security in the sum of \$3,000.00 per unit in the event it begins construction.

In the event this builder fails to reimburse the Program forthwith and fails to place the said security of \$3,000.00 per unit with the Program, the Registrar is hereby directed to carry out his Proposal.

MR. AND MRS. KEITH JOE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
WILLIAM WATSON, Member

APPEARANCES:

MR. AND MRS. KEITH JOE, appearing on their behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

JOEL GINSBERG, representing 724848 Ontario Inc.
operating as Bayview Woods Limited, a Party

DATE OF

HEARING: 11 January 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program to disallow certain claims of Mr. and Mrs. Joe given by way of a letter dated May 1, 1990. At the opening of the hearing, counsel for the builder made an application that it, 724848 Ontario Inc., operating as Bayview Woods Limited, be added as a party to the proceedings and an order was made to that effect.

Also at the opening of the hearing, there was an agreement by all parties that the Tribunal was concerned here with three issues:

1. Should the Applicants be awarded compensation for the delayed closing of this transaction?
2. Were the Applicants entitled to receive a vegetable spray faucet attachment which they claimed they did not get?
3. Did the Applicants receive the solid oak staircase for which they bargained?

During the course of the hearing, it became apparent that the Applicants actually had a fourth claim as well, and the Tribunal heard the evidence and will deal this one:

4. Have the Applicants a claim herein under Section 14 of the Act for breach of warranty with respect to the staircase?

The facts and evidence relevant to the issue of compensation for delayed closing are as follows:

The Agreement of Purchase and Sale was made on May 20, 1988 and fixed a date for closing of January 12, 1989. At the time of making this Agreement, no work had been done by the builder in building the house or any other of about 40 houses in this subdivision. The evidence indicated that the builder experienced delays in getting underway by reason of delays in getting certain municipal approvals.

On October 24, 1988, the solicitors for the vendor/builder, wrote to the solicitors for the purchasers advising that, "Due to difficulties beyond the vendor's control...it has become necessary to extend the closing date" and extended the same to February 16, 1989. This was done properly pursuant to Section 19 of Regulation 726 under the Ontario New Home Warranties Plan Act and this closing date was legally in place, when, on December 16, 1988, a fire or fires were set by an arsonist which completely destroyed a number of partially built houses in the subdivision and damaged others in various degrees.

The evidence disclosed that the construction on Lot 19, which was the lot of Mr. and Mrs. Joe, started sometime in November of 1988 and it is not perfectly clear on the evidence exactly how much of the house was built at the time of the fire but, in the view taken by the Tribunal of the matter, nothing turns on this question. It was the evidence of witnesses for the Program and for the builder that the Schedule was "tight" to meet the February 16 deadline but, without the fire, this would probably have been done.

The next relevant evidence is that on January 9, another letter was sent, this time directly from the vendor to the purchaser's solicitor advising that "due to circumstances beyond our control", the vendor was forced to postpone the closing again to February 28, 1989. No mention was made in that letter of the fire or of the provisions of subsection (2) of Section 19 of Regulation 726 aforementioned.

It appears to the Tribunal that, in seeking the first extension from January 12 to February 16, the vendor was purporting to act pursuant to clause (a) of subsection (3) of Section 19 and in seeking the second extension to February 28, it was purporting to act pursuant to clause (b) of that subsection.

The proper determination of the issue before the Tribunal in this case turns to a large extent upon an interpretation of various parts of Section 19 and I, therefore, set out this section here:

19-(1) Every vendor of a new home of a type referred to in subclause 1(d)(i) or (ii) of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

- (a) the date originally fixed for closing the purchase agreement, or
- (b) an extension referred to in clause 3(a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

(2) Subsection (1) does not apply to the period of delay in closing caused by a strike, fire, flood, act of God or civil insurrection.

(3) Subject to paragraph 5 of the Addendum referred to in paragraph 12 of Section 1 of Regulation 728, subsection (1) does not apply where,

- (a) the vendor extends the closing beyond the original closing date after giving written notice to the purchaser at least sixty-five days before the original closing date; or
- (b) the vendor extends the closing for not more than fifteen days beyond the original closing date or beyond the extended closing date referred to in clause (a), after giving written notice to the purchaser at least thirty-five days before the

original closing date or the
extended closing date referred to in
clause (a)

- (4) Where a claim is made under subsection
(1), compensation shall be calculated from the
original closing date as extended under clause
(3) (a) or (b).

While the period of extension permitted under clause (a) is not limited therein if 65 notice is given, it is subject to the provision of paragraph 5 of the Addendum to which reference is made in paragraph 12 of Section 1 of Regulation 728, also made under the Ontario New Home Warranties Plan Act. This provides that if the vendor gives notice of extensions totalling more than 120 days, the purchaser has the option to withdraw from the contract.

During the course of argument, counsel for the Program furnished to the Tribunal, copies of a Bulletin or set of instructions being followed by officers and employees of the Program at all times relevant to this case which indicated that it was the Program's view, that a vendor was entitled to two extensions under subsection (3) of Section 19, one for 15 days upon 35 days notice and one for a longer period upon giving 65 days notice, such longer period being subject to the provisions of paragraph 5 of the Addendum aforementioned. The Tribunal was informed that if concerned vendors or purchasers consulted the Program for guidance on this point, they would have been advised that only two such extensions were allowed and we were told on behalf of the vendor/builder that that was its understanding at the time it had the two letters sent.

A nice question arises as to whether this is the proper interpretation of the section or whether the vendor can seek as many extensions as it wishes, provided it gives proper notice as specified and always subject to the provision of paragraph 5 of the Addendum aforementioned.

This is not, however, an issue which must be decided in this case because the additional notices of extension which were given did not comply with the requirements of notice.

On February 27, one day before the date of closing fixed for February 28, a letter was sent purporting to extend to March 23 and on March 13, 10 days before March 23 another one purporting to extend to March 29. In neither of these was there a mention of the fire or of the provision of subsection (2) of Section 19, and both of these, therefore, appear to be ineffective attempts to get

extensions pursuant to subsection (3) of Section 19.

In fact, the transaction did close on March 29, although the builder requested the Joes not to move in until April 1 to give it the extra three days to complete unfinished work and they actually did move in on April 1, 1989. If a fire had not occurred and the issue had to be decided on the foregoing facts and evidence, it appears clear to the Tribunal that the Applicants would have been entitled to compensation for delayed closing for the period from February 28 to March 29, 1989.

However, the evidence relevant to the proper interpretation of subsection (2) must also be taken into account. The first question to be determined under that subsection is a question of fact - namely, what was "the period of delay in closing caused by a...fire...". On this point, we have the evidence of Allan Brickman, a construction supervisor with special experience in cleaning up and getting projects underway after fires, who was brought in immediately after the fire to perform this task for the builder. He said that the clean-up took three to three and one-half to four weeks from the fire, and he also told us of certain unavoidable delays in getting it underway - requirements to leave things untouched until the Fire Marshall had completed certain investigations and to comply with certain requirements laid down by the fire insurers.

We also had the evidence of Mr. Ed Perryman, the Manager of the Toronto office of the Ontario New Home Warranty Program, who described a calculation he made that the period of delay was 31 days. In considering all of this evidence, the Tribunal has reached the conclusion that the proper period of time to be calculated in this case as the period of delay in closing caused by the fire was four weeks or 28 days.

The next question which arises is, in the circumstances of this case, from what date should the builder and the Program be entitled to add to this period in determining the date to which they are excused by subsection (2) from paying the compensation provided in subsection (1) of Section 19.

It is the opinion of the Tribunal, that, where Section 19(2) is invoked for a delayed closing, two things essentially occur:

- (a) the status quo of dates and schedules is "crystallized" on the date of the fire, and
- (b) the warranty is "suspended" for a substantiated or an agreed upon period of time.

In this case, the period of delay is a period of four weeks.

The date of closing which was in effect on the date the fire occurred was February 16.

By suspending the warranty for the period of delay of four weeks, we essentially "move" the closing date to March 16.

Since the actual closing on the house took place on March 29, the Tribunal feels that the closing was unduly delayed by two weeks and that, therefore, the builder must compensate the purchaser for costs incurred by the purchaser pro rated for a two week period of time.

During the four week "suspension" of the warranty, further extensions by the builder are not accepted, in that the period of delay has previously been established and no further or subsequent extensions are allowable within that time period.

There is some question in this case, whether the last date covered is March 29 or April 1. As aforementioned, the transaction actually closed on March 29, but at the request of the vendor, the Applicants did not move in until April 1 to permit completion of unfinished work. There is no question that the expenses of the Applicants occasioned by the delay over a period for which the vendor is responsible continued until April 1 and the Tribunal has concluded that it is proper to calculate that compensation upon this basis for those items to which this consideration is applicable.

The Applicants were forced to move out of their previous residence at the middle of January because, while the closing of that transaction was still fixed for January 12, 1989, they had sold it under a contract giving their purchaser possession at that time. They rented a flat temporarily from January 15 to March 31 for \$700 a month. They paid no rent for the first day of April, but \$700 for 31 days in March. The first 21 thereof was not a period for which they are entitled to compensation, but the last 10 days was part of such period. Therefore, the Applicants should recover \$340.70 on this account.

They also paid storage on their furniture and other items from the old house which they could not take to this flat, paying therefore, a total of \$450.87 from January 12 to April 1, a total period of 79 days. Sixteen days thereof amounts to \$91.36. Mr. Joe gave evidence that it cost him \$85 to move his possessions from

the old house to storage and \$175 to move them from storage to the new house and that it would have cost him \$100 to move them from the old house to the new house, so that he had an extra cost of \$160. These costs were incurred by way of truck rentals and the actual moving of the furniture and other items was done by himself and other persons who made no charge for their services. This claim is, therefore, for the sum of \$160.00. The question is whether it should be allowed. It can be argued on behalf of the Applicants that at the time they entered into the contract to sell and give up possession of their old home, they had a contract with the vendor here which provided for a closing on January 12 and therefore should be entitled to compensation for the extra moving costs to which they were put by the delay. While this would probably be the result of a claim at law by the Applicants against the vendor, the Tribunal must keep in mind that it is not adjudicating such a claim but rather a claim against the Program pursuant to section 19 of the Regulation.

This Regulation clearly exempts from compensation costs incurred by delays properly claimed by the vendor as coming within either subsections 2 or 3 of Section 19. The delays made available to the vendor by these provisions, namely to February 16 and then to March 16 put the Applicants in a position where they had to incur this extra cost of \$160.00 without reference to the final delay of 16 days for which the Program must compensate them and, therefore, the Tribunal can not allow this claim.

Finally, the Applicants are entitled to the \$25 a day provided in the Regulation for 16 days or \$400. The total of these sums is:

Rent	\$340.70
Storage costs	\$ 91.36
Incidental payment of \$25 per day	<u>\$400.00</u>
	<u>\$832.06</u>

In dealing with the second numbered issue as to whether the Applicants received the vegetable sprayer to which they were entitled, the Tribunal has very considerable assistance from a recent decision of this Tribunal released on December 28, 1990 in the case of Sinson vs. Registrar of the Ontario New Home Warranty Program in which the appellant Sinson, who was pursuing a claim for a vegetable sprayer and certain other items in his home in the same subdivision against the same builder and was relying upon identical documentation as far as the vegetable sprayer was concerned and upon very similar evidence.

In its reasons for judgement in that case, the Tribunal analyzed all of the relevant evidence at considerable length and reached the conclusion that it should not interfere with the decision of the Program to disallow this claim. For the same reasons outlined in that decision, the Tribunal here concludes that Mr. and Mrs. Joe did receive the vegetable sprayer for which they bargained. In the Sinson case, the Tribunal put and answered the question as follows, at page 11 of the judgement:

Did Mr. Sinson receive the vegetable spray to which he was entitled? The Tribunal believes that he did for the following reasons:

- 1) The device he received was attached to his kitchen faucet in the manner set out in Schedule "A";
- 2) The purpose of the device was to serve as a vegetable spray. This is clearly borne out by the package which Mr. Sinson brought to the Tribunal and which states that the aerator device may be used to spray vegetables, as well as by the testimony of Mr. Perryman of the New Home Warranty Program, who was shown a similar device when he asked for a vegetable spray.
- 3) The device which Mr. Sinson seeks does not resemble the one promised in Schedule "A" because it is a hose attachment to a pipe and, therefore, not attached to a faucet.

The Tribunal finds, therefore, that the builder did not make an illegal substitution, but rather provided the exact item promised. The New Home Warranty Program was, therefore, justified in refusing this claim by the Applicants.

The Tribunal reaches the same conclusion with regard to the claim for a new solid oak staircase. The evidence established that the staircase provided was, in fact, a solid oak staircase as that term is established in the building industry. It was a curved staircase and, therefore, a solid oak stringer or stringers would not have been practical as it would have cracked when curved. A stringer composed of several slim pieces together, the outside of which were oak, could be curved to the proper shape and was in appearance solid oak. The treads, which would be subject to much the most wear, were of solid oak and the wood visible to the eye was either solid oak or oak veneer. Therefore, insofar as the Applicants claim arising out of an alleged substitution of the staircase is concerned, the Tribunal concludes that it should not interfere with the decision of the Program to disallow this claim.

The Tribunal reaches a different conclusion with regard to the fourth issue of breach of warranty because of defects in the construction of the staircase. There is no doubt that there were defects in the staircase when the Applicants took possession of the house. Efforts had been made by the builder to remedy these and such efforts have been at least substantially successful. The representatives of the builder said, in evidence, that they believed these defects had been completely corrected but the Applicants still have complaints.

The Applicants must realize that the onus upon the builder is not to deliver a staircase to the satisfaction of the Applicants, but rather to deliver one in compliance with the warranty provided in Section 13(1)(a)(i) of the Ontario New Home Warranties Plan Act, namely that it must be constructed in a workmanlike manner and be free from defects in material. If this has already been done, there is no further obligation upon either the builder or the Program with respect to it, but if it has not been done, it must be brought up to that standard. It, therefore, appears appropriate for the Tribunal to make an order on this issue that if this has not already been done, the Program must complete its obligation to see that the staircase meets the test of being constructed in a workmanlike manner and being free from defects in material.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program as follows:

1. To pay to the Applicants the sum of \$832.06 by way of compensation for delayed closing;

2. to disallow the claims with regard to substitution of the vegetable sprayer and the solid oak staircase; and
3. to ensure that any steps are taken which are necessary to repair any remaining defects in the staircase and to deliver to the Applicants a staircase constructed in a workmanlike manner and free from defects in material.

MARSHALL JOHNSTON
AND
ROBERT SHANTZ

APPEAL FROM A DECISION(S) OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
WILLIAM WATSON, Member

APPEARANCES:
MARSHALL JOHNSTON, appearing on his own behalf
ROBERT SHANTZ, appearing on his own behalf
STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 14, 15, 16, 17 January 1991 Ottawa

REASONS FOR DECISION AND ORDER

Robert Shantz and Marshall Johnston are neighbours in a subdivision of some 29 homes in the suburban community of Osgoode, which is on the Rideau River south of Ottawa.

Johnston's home is on corner lot 19 with municipal address 3344 Regburn Drive and Shantz lives up Regburn Drive at 3362 which is lot 22. Of the two properties in between; James Potts lives at lot 21 in a house built by the same builder Wesmar Construction Company Ltd. ("Wesmar") and occupied for some months by Wesley Vanderploeg, the principal builder and owner of Wesmar. Wesmar built 23 of the houses in the subdivision.

Johnston and Shantz have requested a joint hearing for their two claims since the basic principles each advances are congruent; while they differ in advancing several specific issues relevant only to one or the other home.

Marshall and Syrena Johnston bought their home from Wesmar on March 18, 1987 with the transaction to close on July 24, 1987. Marilyn Shantz took title to her property on September 25, 1987.

Johnston and Shantz have their claims against the New Home Warranty Plan set out as seven issues which are as follows as outlined by Shantz in his evidence:

1. That both houses were constructed with the basement floor slab below the area water table which puts them at risk in the spring time of flooding, shifting and the lifting and cracking of their foundations.
2. That the discharge of their sewer lines is less than one-half metre above the water table.
3. That the two casings for their wells were cut off below grade so that a risk of contamination of their water supplies does exist and should be remedied.
4. That crickets have entered both homes because of a gap between foundation wall and home sill plate which has not been properly blocked by sill gasket or spray foam used later.
5. That multiple bridging and blocking of the floor joists is required for both houses, although the claim advanced by Shantz was thirteen months after possession and was, therefore, denied by the New Home Warranty Program.
6. That legal costs for actions undertaken by both Johnston and Shantz against their builder who is in bankruptcy and whose registration under the New Home Warranties Plan Act is revoked, should be recoverable as part of their claims since they were misled as to the jurisdiction of the New Home Warranty Program and, accordingly, began certain litigation. These legal fees were \$4,003.98 for Johnston and \$2,871.13 for Shantz.
7. Johnston claims a breach of warranty in his building contract since his foundation is not 8" higher than his neighbours on

Lot 20 which Wesmar had undertaken to do in the Agreement of Purchase and Sale because of Johnston's concerns about flooding. A survey showed that the foundation was, in fact, 2" lower than that on Lot 20. Shantz claims certain damages for a 5" deep water back-up from his sump pump on December 6, 1987, which ruined some personal property.

Shantz's claim was answered by an offer from the plumber's insurance to pay 25% of the damages while Wesmar's adjusters refused any payment. Marilyn Shantz began litigation in the District Court which was met with a defence and with a personal third party claim against Shantz for defamation damages of \$50,000.

Other neighbours had water problems in early 1988 with sump lines freezing, pumps blocked and hook-ups of hoses to expel water through foundation windows being required. A meeting was held at the Wesmar office on February 26, and representatives of the Ontario New Home Warranty Program and of the Township of Osgoode attended.

On May 8, 1988, Johnston sent a letter to Wesmar with the details of fifteen complaints. On June 2, 1988, Shantz sent his letter concerning nine matters. A conciliation was held at Johnston's home on July 18, and four items were found warranted while seven were not, including concerns about a tilted culvert, the sewage installation, the well being cut off and the basement not being water proofed. The Shantz conciliation took place on October 25, when seven complaints were found to be warranted while ten were not. Among those refused were the concerns of dark cracks in the basement floor, the building of the home in a water table, the grading of the property, the installation of the septic system and the capping of the well below grade.

In his evidence, Johnston reviewed the principles of septic tanks systems and the history of his litigation against Wesmar which cost him \$4,003.98. When Wesmar went into bankruptcy after the Examination for Discovery of Wesley Vanderploeg, Johnston ended his action against Wesmar.

Shantz had an inspection of his home done by Overhill Engineering Ltd. who reported their findings on August 30, 1988. The inspection found six deficiencies, referred to certain Ontario Building Code requirements and suggested the corrective action needed.

The complaints were:

A: "Air infiltration in basement and presence of crickets and other bugs in basement."

This was said to be due to the sill plate not being grouted into the cement foundation as required by O.B.C. 9.23.7.2(1); or failing to have proper caulking and a gasket seal as in (2) above. The spraying of insulation foam inside and out of the foundation was suggested.

B: "Lack of ventilation in bathroom, which resulted in extensive humidity problem in the area."

This would be cured by having the bathroom fan exhaust to the outside.

C: "Flimsy separation between the garage and the living room."

Gas proofing was said to be needed with the installing of a full 3/8" drywall.

D: "The top of the foundation is less than 6" (150 mm) above finished grade."

This would be fixed by lowering the grade although drainage problems could result.

E: "Floor joists were not properly restrained in the breakfast room and the southeastern side of the house."

F: There was only one wall plug in the garage which was found to be insufficient.

Johnston invited the neighbours to his home on September 14, 1988 to discuss common concerns of home quality and drainage, and then afterwards wrote a general letter of complaint to the Warranty Program, Wesmar, the Osgoode Township office and the Ontario Ministry of the Environment ("MOE"). A response from the MOE dated September 22 noted that the well casing had been properly installed originally and that the plumber had cut off the casing and "to extend the well casing above the present grade an appropriate length of casing can be welded by a driller to the existing casing." By their inspection, the MOE further noted:

On August 19, 1988 Mr. Montcalm,
Environmental Officer, inspected your

property. Utilizing a transit, elevation shots were taken across the tile bed. The survey plan shows the elevation of sub-lot 19 to be 93 metres. Since the certificate of approval required a 1 to 1.3 metre raised bed the finished grade in the tile bed area was required to have been between 94 and 94.3 metres. Siting on the culvert with an invert elevation of 92.45 metres, according to the drainage plan, the present grade elevation in the tile bed area was determined to be 93.6 metres some 0.4 to 0.7 metres lower than required.

To correct this the tile bed would have to be reconstructed to the required grade and fed by a pump which would be located in a pump chamber separate from the existing septic tank.

In the three chart exhibits, Johnston and Shantz presented to the Tribunal the composition of soil layers, elevations of lots, drainage patterns with their elevations, the mechanics of sewage tile bed operations and photographs to illustrate these various aspects. In this, as in all of the collection and presentation of voluminous exhibits and documents, Johnston and Shantz gave the Tribunal as fine a presentation as the individual members had ever seen. The two Applicants are both articulate, clear in their approach and have brought forth their evidence in a thorough, logical and consistent manner.

In Johnston's opinion, his foundation was constructed into the water table as shown in the survey plan by the minimum height of the top of the basement floor slab in both homes to be 92.0 metres above sea level, while the water in a dug pit as he measured it, was 92.495 metres. The Township of Osgoode did no surveying of the lots because of the opinion that the basement floor slabs in the homes were not built into the water table.

From the information gathered by Johnston, the main reason for the problem was the \$5,000 cost to the builder which would have developed if the foundations were correctly built 8" higher, since much soil would have then had to be obtained.

While the solution would be to lower the drains to clear water problems, Johnston agreed that many sand point wells in the area might then go dry, and that surface drainage problems would still remain, although foundation footings would no longer be submerged.

In cross-examination, Shantz agreed that items in the Overhill report were attended to namely (b);(c) by caulking; and (e) while Shantz was not pursuing item (f). As to his seven issues he noted:

1. There are no new basement cracks or movement at present and no evidence of any erosion. Some cracks are wider, longer and more prominent. On the land surface, some pooling of water does occur around two old trees and the surface grading does not allow for easy run-off. The road surface is higher than the front lawn.
2. If the sewage tile bed is less than 1/2 metre above the high water table, there have been as yet no problems and surface water above the bed does drain away.
3. The Ministry of the Environment has not stopped the use of his well and several tests have shown water quality to be sufficient.
5. The claim was 13 months after possession of the house.

In cross-examination, Johnston recalled the problems of January 1988 when the sump pump line was frozen and in a thaw, a second line had to be put in to discharge out a window on to his lawn. His pump now runs continually in March and April each year. There have been no problems with water supply from his well, and no recent septic tank problems. Johnston agreed that he wants a safe and secure home, and also to be reimbursed for his legal costs. He noted that the Township of Osgoode agrees that his culvert slopes the wrong way. Both he and Shantz have "shallow basements" with the foundation extending 150 millimetres above ground and a stud wall then built upon that foundation to give the necessary basement height.

Kirk Hansen is a Senior Environmental Officer with the Ministry of the Environment, and approves private sewage systems. He noted that certain requirements for construction are to be complied with and he is interested in the distance between the bottom of the crushed stone bed of a system and the water table. A zone of aeration is wanted since the bacteria in the system operate without air. Since there is no damage or sewage back-up,

the Ministry of the Environment would not prosecute the homeowner for a tile bed which may be less than one-half metre above the water table. While problems could occur since the safety factor zone is minimal, there have been no problems so far. In his view, the wells have been properly installed, but the cut-off 30 cms. of casing should be replaced.

James Pitts bought the house on Lot 21 on March 1, 1988 from Wesmar. He discovered that the home was not under the Warranty Plan, since the builder had lived there. He was concerned about problems of possible high water levels and noticed a "ring" on the recreation room carpet in the basement where he suspected there had been flooding in the past. He was bothered by crickets which entered into the basement area and by water leakage problems with windows and at the front door. The builder was called on four or five occasions and then told not to attempt any repairs, as arrangements were made for another person to make the necessary repairs including those to stop a roof leak. He has three pumps in his system, of which two are submersible and one is conventional. There are three lines which pump any overflow of water and they are in operation all of the time. He has particular problems in spring thaw periods and is of the opinion that the houses are built 8" to 15" too low. His septic system is operating, but he does have some concerns about future problems.

As the final witness for the Applicants, Robert Louissieze explains his experience as a sales representative for a major pump supplier in the Ottawa area and as a representative for manufacturers of four or five major suppliers of pumps to Mannion's Pump House, which overhauls, maintains, repairs and deals with pumps and also designs various systems. He has visited the homes of Johnston and Shantz and knows the subdivision in which they live. In his opinion, the pumping system is not adequate due to the volume of entry of water into the sump pit which requires greater usage and wear on the pump from frequent operation and, therefore, cuts the expected 12 year lifespan of the equipment by as much as one-half. In his opinion, a generator back-up would be needed for a perfect system so that 6,000 watts of power for a one-half horse power engine and two alternating pumps could deal with any water problems in the area. The cost of such equipment would be about \$1,500 for an electronic panel with two pumps and an alarm, together with \$400 for installation and a generator that would cost from \$6,000 to \$8,000 complete with automatic controls and batteries. In his view, there should be a pit at least 36" deep and 36" in diameter to give sufficient space to install the necessary equipment.

On cross-examination, he acknowledged that there was no installation of such equipment in any of the Osgoode area homes,

and that only two of these larger systems have been installed in the total volume of 200 to 300 installations which his company does in a year. The usual type of pump used in these projects is a submersible one since the water helps to cool it and lengthens its useful lifetime.

As the first witness for the New Home Warranty Program, Gordon Pratt who is the Director of Development for the Township of Osgoode, reviewed the history of the subdivision. He is a Civil Technologist and was the consultant for the subdivision agreement and became a Township employee while the agreement was being implemented.

There are 29 one-half acre lots, and by mid-1988 the Township assumed the roads and then released the development bonds one year after the roads were paved. He is well aware of the grading and water table in the area. The land is level and three or four feet of fill was required for the roads. The minimum floor slabs were set out on the plan since the land is wet, and the water table is well known to be just two or three feet below the surface. While the builder could and probably should install a basement floor slab higher, the level was set to avoid some pumps running continually. Wesmar was the main builder in the subdivision, and Pratt did look at more than one-half the installations and found them satisfactory. In his opinion, nothing practical can be done to lower the water table since the land is very low lying and both wells and installed foundations would be at risk if the water table was lowered. He agreed that the culvert for the Johnston home is wrong and the Township will make the necessary repairs as the inlet end is too low.

Wesley Vanderploeg was the owner and builder of the construction company and had built 20 homes in this subdivision and another 60 or so elsewhere in the area. He stated that he knew the water levels and planned to stay 8" above the water table with his basement slabs. Construction took eight to ten weeks and each lot had its own well in front of the house and a septic bed to the rear. He stated that the well casing was cut off since there was no need for any servicing as the pump system was inside the house. He was not aware of the need to have the casing show. There were no problems of which he was aware for any septic or well systems in the subdivision, nor were there any municipal orders to comply with any defects. In his opinion, he had successfully stayed 1/10th of a metre higher than necessary for his floor slabs, and believed that neither of these homes was built into the water table.

Bob Plats is a Civil Engineer and consultant with more than 20 years experience. While water tables in an area can vary,

he noted that a drainage system is needed to deal with water from the surface and from below the water table. All basements here must be "damp proofed", and have weeping tile systems installed with a perimeter channel whose top is below the basement floor. Damage will occur for a house built into the water table only if unequalized pressures occur.

If there was hydrostatic pressure under the floor slab, Plats stated that there would have to be leaks into the basement and neither home under review has that present problem. In his opinion, the fact that there have not been water leaks into either basement for two years shows that the homes are not built into the water table.

Paul Picard is a Senior Conciliator with the New Home Warranty Program with five years service and was earlier self-employed in construction in Alberta. He inspects some 200 homes each year in the Ottawa area, and he did the conciliation inspection for Johnston and made two reinspection visits. He had nothing to observe as to the operations of the well or the sewage systems and stated the Ministry of the Environment would not act to resolve the matter of cut-off casing. In his view, septic tanks and wells are not his concern as long as there are no problems.

Heather Mayhew is a Conciliation officer who visited both homes in January 1990 to do a follow-up reinspection. Since the sill gasket concern of Johnston was more than one year old, no coverage was to be provided and there were no apparent problems with the floor joist system. As to the matter of the water table, she observed slight water stains along normal shrinkage cracks. There were no damages and the sump pump is operational.

The concerns expressed to her about the septic bed and the well should be addressed to the Ministry of the Environment, she said since there were no outstanding orders to comply by the Ministry of the Environment or the by Township of Osgoode. In addition, there were no damages which could be seen. She agreed that the Program would enforce an order to comply, but would not initiate matters for the septic system and the well in the absence of any complaint about actual damages.

In argument, Shantz reviewed the seven issues raised before the Tribunal. He believes that his home is constructed into the water table and that damp-proofing and water-proofing are concerns. He seeks a sump pump system with control board and generator designed and installed to give him safety from any flooding risk. The septic bed and well issues are a responsibility of the New Home Warranty Program in his view as they are appurtenances to his home. He wishes the casing to be restored on

the well and a pitless adapter installed. He requires the Ministry of the Environment to inspect his septic system and then have any problems corrected. The basement foundation sill gap is a concern since he wishes to finish his basement and the present spray foam installation is likely not good enough. The claim for legal fees is based on his having to act when the New Home Warranty Program would not assist him and also the flood damages would have been avoided if the basement floor had been set at a correct elevation in the first place.

Johnston shared Shantz's opinions as to the need for an improved sump pump installation and the manner in which the septic tank and well concerns should be addressed. His sill plate concerns continue and the repairs to his floor joist bridging are being sought. Legal fees are also wanted, as are the damages suffered when the protective feature of a higher foundation was not attended to by the builder Wesmar as the terms of the purchase agreement set out.

Counsel for the New Home Warranty Program reviewed for the Tribunal the warranties which are set out in Section 13 of the New Home Warranties Plan Act. That section sets out:

- 13.(1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code.
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.

With respect to the three sub-items under Section 13(1)(a), counsel is of the opinion that they have all been met in the construction of these two houses. A potable water supply is being delivered and the sewage discharge system is being properly operated. The Ministry of the Environment had approved both of those installations and the Ontario Building Code is not involved in the location or the detail of the water systems.

While Johnston has never had any water in his basement, Shantz was subjected to a flood in December 1987 to a 5" maximum and it appears that that occurred because the sump pump was not working which it did when the float was adjusted.

Counsel acknowledged that at certain times during the year, the water table in the area may rise above the level of the basement floor. However, there is no evidence that either or both of these homes is built in to the water table and a drainage system is provided so as to prevent any further problems. The floors are not subjected to any hydrostatic pressure and if the float level is set at the middle of the slab for the sump pump operation, then any pressure should be equalized. The owner has a duty to monitor and maintain the system and there is no obligation on the builder or the New Home Warranty Program to keep such matters under constant review.

Counsel noted that Part 9 of the Ontario Building Code gives alternatives to deal with water problems where either the water is to be removed from the site or a building is to be waterproofed and allowed to float in a water table. In this instance, systems are installed to remove the water from both of these houses and the weepers do the job with a good flow of water so that the builder's system as installed does work.

Use Permits were given with respect to the two septic systems by the Ministry of the Environment and they both appear to be working satisfactorily. While they may not be one-half metre above the water table, they apparently are installed satisfactorily because there have been no obvious problems. The Ministry of the Environment could have prosecuted the owners of the homes if there were any discharges or could close the systems down but nothing has been done because, in fact, there have been no problems.

The matter of the well casing was discussed and it was noted that these casings are to extend 30 centimetres above ground in order to stop ground water contamination and for access. Since there is no submersible pump, there is no need for access and, in his view, for Johnston and Shantz to require extensions to these well casings is unreasonable since the extension would be for no

useful purpose and since there have been no damages which have been suffered by either of the Applicants.

In his view, the homes were built at more than the minimum elevation of the basement floor slab required by the Township of Osgoode and that even if there are some technical violations of the Ontario Building Code, there are no apparent effects and there are no damages which have been proven by the Applicants.

Accordingly in the view of counsel, there have been no breaches with respect to the items quoted from Section 13 that would cause the New Home Warranty Program to make any repairs or renovations.

With respect to the claim for legal fees and costs by the parties, counsel referred the Tribunal to the decision of Simpson (1988) 17 CRAT 168 which confirmed the practice of the Tribunal not ordering costs and fees in any applications. Therefore, the costs and legal fees are not recoverable in the applications before the Tribunal.

After consideration of the evidence brought by the parties, the Tribunal concludes that the claims made with respect to the homes being built into the water table and with respect to the septic beds construction cannot be supported. While construction of the two basement slabs may put these homes into the water table at certain times of the year, there has been no observable damage resulting and the sump pump systems as installed appear adequate for their duties. Both septic systems are working and have shown no problems and neither well is contaminated.

The claims for repairs to the joist bridging system were made after the year of possession had passed and cannot be sustained. The Tribunal cannot order the payment of the legal fees or of the damage claims of either Applicant. There is no evidence that the legal actions were begun as a result of any failure by the New Home Warranty Program and no liability accordingly results.

The foundation height claim of Johnston is a matter of contract and any hypothetical resale loss is not the responsibility of the New Home Warranty Program. The flood damages which Shantz suffered cannot be proven to be the responsibility of the New Home Warranty Program. They have to be claimed for elsewhere which was done albeit without success.

The Tribunal does accept the claim of the Applicants in two areas. The water well casing claim is allowed as a

workmanship matter and the Shantz claim of the sill plate gap problem was acknowledged by Ms. Mayhew who offered to visit the house if any insect problems continued. The Tribunal will hold the Program responsible to do that through 1991.

Accordingly pursuant to the powers given to the Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal orders:

1. That the New Home Warranty Plan locate the well at each property and have the casing extended above the present grade to meet the requirements of the Ministry of the Environment.
2. That the New Home Warranty Plan attend if called upon by Shantz during 1991 to resolve in a workmanlike manner any cricket or other insect problems caused by their entry through any gap between the foundation wall and the sill plate.

ROBERT AND CHRISTINE JONES

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES G. LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:
ROBERT JONES, appearing on their behalf
STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 10 October 1991 Timmins

REASONS FOR DECISION AND ORDER

This is an appeal by Robert and Christine Jones from the decision of the Ontario New Home Warranty Program dated June 11, 1990 disallowing their claim for damages on the grounds that it was not based on a major structural defect and, therefore could not be considered beyond the first year of occupancy.

The house was built in 1983 and Jones, who took possession on June 1 of that year, in his notice of appeal contends that the home was completed in June of 1983 but that:

...we have experienced problems with the house ever since this date.

There has been work done on the house every year with the exception of 1989. We are still experiencing problems. Several procedures have been taken to correct the problem, none of which have worked.

Jones was the first owner of this house and in his evidence stated that there was water leaking into the downstairs sunroom in winter during mild weather which stopped when the weather became cold. He reported this to the builder and during the first year, he worked on the flashing thinking the water came from there. A further attempt was made in 1985 to address this

problem and in 1986, the builder installed a wind turbine. In 1987, an extension was added to it and in 1988, a roof vent installed. The leak, however, apparently continued on warm days and Jones then notified the Program of his dilemma on February 18, 1988. Almost five years had elapsed since he first took possession of the house.

A Proof of Claim filed by Jones on March 9, 1988 alleges the following:

1. Upstairs ceiling - severe cracking occurred during the first winter of occupancy. Contractor retaped and plastered during the following two springs. He gave no reason for this problem occurring every year. Recently, the problem has reoccurred. We brought another contractor in to examine this problem and he stated that it is truss uplift and that the trusses have not been installed properly.
2. Sunroom/Family Room - roof has been giving us trouble since the house was built. During the second year of occupancy, the contractor installed a ventilator pipe outside on the roof but this did not solve the problem. The contractor decided that the vent pipe was too short and added an extension during the third year. This, however, did not solve the problem either. Inside the sunroom, the gyproc on the ceiling and wall and the wood on our windows has been damaged and needs to be replaced.

The premises were inspected on May 4, 1988 by the Program's conciliator Kevin Blacklock and in his conciliation report, he made certain recommendations to the builder as a result of which further work ensued. The report reveals Mr. Blacklock considered the matter fell within the definition of a major structural defect and, therefore, the five year warranty applied. Blacklock attended again on September 16, 1988 and again on April 25, 1989, but no further complaint about the water was made. On the latter date, Mr. Jones complained about the truss uplift which he alleged was defective and Blacklock again attended on June 15, 1989 and October 16, 1989, but it appeared that the water problem may have been successfully addressed.

On January 10, 1990, however, a further complaint was received from Jones as follows:

Please be advised that we are once again this year experiencing problems with water leaking into our sunroom. Repairs were made in August of 1988 and a vent was run along the roof on the outside of the house. The room leaked again during 1989. We informed you at the time the problem occurred but no repairs were made inside or outside during 1989. As a result of the leaking which occurred two weeks ago the wood frame around the inside windows are damaged as well as the paint and gyproc along the ceiling and the wall above and below the windows. I telephoned you to inform you of the problem, however you were not in the office that day. The secretary told me you were to be in Timmins on January 15.

Blacklock returned to the premises on January 24, 1990 to report and in his evidence said there signs of a water stain not seeping through the ceiling now, but down the walls. He had apparently considered the problem solved by the further work done by the builders since he had based his opinion on the lack of ventilation being the cause.

Attending at the premises also on January 24, 1990, Robert Flourde, a conciliator with the Program made certain observations and took some photographs of the water stained areas. These were entered as Exhibits 7A to 7E.

He returned to the premises in May 1990 on a sunny day when the Program's contractor was also there. A sheet of plywood and some shingles were removed from the sunroom to ascertain if there was sufficient ventilation and insulation. Their conclusion was that both were sufficient and the installation was quite proper. Mr. Gallant, the Program's contractor, was of the opinion that the protection afforded by 3' of tar paper from the edge would solve the problem since there appeared to be only 1' which was covered at the present time. The cost of this was estimated to be approximately \$500. This, however, could not be considered a major structural defect.

Mr. Flourde then on June 11, 1990 wrote to Mr. Jones on behalf of the Program advising him that the claim could no longer

be considered since there was no major structural defect and he set out his reasons as follows:

Our records indicate that the original date of possession of your home was June 1, 1983, it therefore follows that your claim cannot be considered under the provision of the vendor's warranty. Your claim documents have identified the following matter:

1. Sunroom ceiling leaking water again this year. Experiencing same problem each year.

After careful review of these items, it is the Warranty Program's decision that a major structural defect does not exist. Our reasons are as follows:

a) no evidence of defect in materials or workmanship resulting in load-bearing failure.

b) no evidence of defect in material or workmanship that materially and adversely affects load-bearing function.

c) no evidence of defect in materials or workmanship that results in condition that materially and adversely affects the use of the home (in its entirety).

OBSERVATION: Inspected inside home in January 1990 and saw water stains on walls and windows in sunroom. Could not identify problem on outside of roof. Inspected the roof outside on May 30, 1990. There the men removed the shingles and 1 sheet of 4 x 8 aspenite approximately 1/2 way up the roof. Investigated inside of roof and found that insulation is properly installed at eaves and there is ample space for ventilation. At this point looked in all directions and insulation has been installed properly. Also checked for eaves protection and found that there is only a 1 ft. wide black plastic all along the room at the first shingles where at least 3 ft. of eave protection should be installed to provide sufficient protection.

COMMENT: There seems to be ample ventilation and the damage appears to be caused by ice dam-up at eaves of which is not considered a major structural defect and cannot be warranted by the Program.

In his argument, Mr. Jones contended that since the first year of occupancy, there has been a continuing problem with water coming in the sunroom on warm winter days. The evidence is that it is only at milder temperatures when ice and snow melt that he experiences this problem.

Counsel for the Program points out that the preponderance of evidence points to the build-up of ice under the eaves which backs up during the cold weather and on milder days begins to melt. This, he contends, is not a major structural defect and this is supported by the evidence of the Program's conciliator and the contractor.

This Tribunal is bound by both the evidence before it and the provisions of the statute under which it operates. We are of the view that the work done by the builder in the succeeding years after occupancy, supervised and inspected by the Program in 1988, addressed the major problem of ventilation. The later difficulties faced by the owner appear to arise from ice building up under the eaves and eventually melting. This does not fall within the category of a major structural defect and we, therefore, must disallow the claim.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

PRAKASH NATH KHANNA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MORTGAGE BROKERS

TO REFUSE TO GRANT THE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding
JAMES GRAY LESLIE, Vice-Chairman as Member
MICHAEL HEWTON, Member

APPEARANCES: PRAKASH NATH KHANNA, appearing on his own behalf
MARK MICHAELS, representing the Registrar under
the Mortgage Brokers Act

DATE OF HEARING: 12 November 1991 Toronto

REASONS FOR DECISION AND ORDER

This was a hearing to review the Proposal of the Registrar to refuse registration to the Applicant on the grounds that the Applicant is not entitled to registration under section 5 of the Mortgage Brokers Act since:

- (a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business;
- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

On or about November 27, 1989, the Applicant applied for registration as a mortgage broker. The Applicant intended to operate a mortgage brokerage business under the name Mini-Mega Financial Services Inc. It is clear from the evidence that Mr. Khanna gave false answers to two questions on the application form. He answered "No" to the question "Are there any unpaid judgements outstanding against the applicant?", when, in fact, there were a number of unpaid judgements outstanding against him. Secondly, he answered "No" to the question "Have you ever been convicted or

found guilty of an offence under any law of any country, state, or province thereof, or are any such offence proceedings pending?" In fact, Mr. Khanna had been convicted of two counts of fraud on or about October 5, 1982.

Mr. Khanna offered no plausible explanation at this hearing as to why he gave false answers to these two questions on the application form. The Tribunal does not accept his explanation that he "might have forgotten". The application form contains a warning to applicants that "It is an offence to knowingly provide false information on this application and any attachments". These questions on the application are intended to assist the Registrar in determining whether the applicant has been law abiding and financially responsible in the past. The fact that an applicant gives false answers to these two key questions can itself be taken as an indicia of the applicant's lack of honesty, integrity and lawfulness where, as in this case, no credible explanation for the false answers is provided by the Applicant.

The Applicant has admitted the two convictions for fraud in October 1982. Mr. Khanna has applied for, but has not received a pardon for these offenses. Mr. Khanna pleaded guilty to two counts of defrauding his former employer H. & R. Block (Canada) Inc. The amounts involved were \$29.00 and \$21.00 respectively. Mr. Khanna had also been charged with eight other counts of defrauding his said employer, however, these were dropped in exchange for the guilty plea on the two counts mentioned. At the time Mr. Khanna was represented by counsel. Despite his guilty plea to these charges, Mr. Khanna attempted to take the position before the Tribunal that he was not guilty of the offences and blamed his "stupid lawyer" for making a deal with the Crown. The Tribunal has no intention of going behind these convictions. Mr. Khanna was duly convicted of two counts of defrauding his employer, offenses involving a breach of trust. The nature of the convictions are of great concern to the Tribunal, as they no doubt were to the Registrar. As a mortgage broker, Mr. Khanna would be handling large sums of other people's monies. The Registrar must be assured that persons registered as brokers are completely and unquestionably honest and trustworthy.

Although these convictions occurred in 1982, and Mr. Khanna has had no further convictions since, the convictions remain one indicia of past conduct which the Registrar can and should take into consideration in assessing the application for registration.

As to the outstanding judgements, the following were among the facts agreed to by the Applicant in the Agreed Statement of Facts:

7. There are, in addition, certain writs of seizure and sale outstanding against you and registered with the Sheriff. One relates to a judgment obtained by the Empire Life Insurance Company in the sum of \$6,149.62 with respect to allegations that your account was in a debit balance at the time you resigned as an agent. The judgement was issued in May of 1985 and the writ was filed on June 14, 1985.
8. There is a writ of seizure and sale filed on or about February 26, 1987 in the amount of \$11,668.73. The said writ relates to a loan obtained by Himjoyti Enterprises Limited which carried on business as Gaylord Restaurant. The business was owned and operated by Sadhna and Anil Sharma and you were alleged to have guaranteed their indebtedness to the National Bank of Canada. When the business failed judgment was obtained against the Sharmas as debtors and yourself as guarantor. The Sharmas subsequently satisfied the judgment and obtained an assignment of the judgment.
9. There is a further writ of seizure and sale issued on or about December 6, 1987 in favour of the Canadian Imperial Bank of Commerce in the sum of \$9,989.11 relating allegedly to a line of credit with that bank.

With respect to the writ of execution in favour of Empire Life Insurance Company, the Tribunal heard evidence that the sum of \$140.00 has been collected as the result of garnishment proceedings. Mr. Khanna made it clear in his evidence that he has no intention of making any payment in respect of this judgment, essentially because he does not believe that this creditor is entitled to receive any monies from him. The fact that this judgment represents a decision of the court apparently carries no weight with Mr. Khanna.

As to the writ of execution in favour of the National Bank of Canada and assigned to Sharma, Mr. Khanna against expressed the view that the judgment "was not right" and that he would not pay it "on principle". Again he takes the position that his opinion prevails over that of the court.

The only judgment that Mr. Khanna considers that he is obliged to pay is the one in favour of the Canadian Bank of Commerce. Although this dates back to 1987, Mr. Khanna has made no payment on account of the judgement. While Mr. Khanna claimed in his evidence to have a net worth of over \$1,000,000.00, he also claimed not to have the funds available at present to pay this judgment. Under cross-examination, he testified that he intends to pay the judgment. When counsel inquired as to when he would be paying it, Mr. Khanna responded curtly "I'll decide when".

Mr. Khanna filed numerous letters in support of his good character, but failed to call a single witness to testify on his behalf in respect of character. It is unclear from the letters whether the respective authors were aware of Mr. Khanna's past convictions and unpaid judgments. Under all the circumstances, the letters can be given no weight.

The Tribunal finds that the Registrar has not erred in concluding that Mr. Khanna cannot reasonably be expected to be financially responsible in the conduct of his business. Nor has the Registrar erred in concluding that the Applicant's past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. The Registrar is, therefore, directed to carry out his Proposal.

L.J.W. HOLDINGS LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C, Chairman, presiding
TIBOR PHILIP GREGOR, Member
WILLIAM WATSON, Member

APPEARANCES:

LLOYD WHITE, its agent

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 10 January, 29 July 1991

Toronto

REASONS FOR DECISION AND ORDER

L.J.W. Holdings Limited applied for registration as a builder under the Ontario New Home Warranty Program on January 24, 1990. Lloyd J. White ("White") is the sole owner, director and officer of the Ontario corporation which has a business address in Manotick, Ontario. The usual Vendor/Builder agreement was completed and sent to the Program.

A Proposal was issued by the Registrar to refuse registration because White as sole owner, director and officer of 137034 Canada Inc. which carried on business as "Lloyd White Construction" had not caused that previously registered builder to repay to the Program an award for repair of warranted items made in the amount of \$22,557.225 for the "Yuen" residence. There was a second award made for \$12,575.25 for the "Kouk" residence when White was not a registered builder. Another earlier incomplete application to become a registered builder was received on November 28, 1986 from 665175 Ontario Limited, in which White was the sole owner, director and officer. Registration was refused because of no Vendor/Builder agreement and because of the earlier debt for the "Yuen" residence; and White was warned not to hold himself out as a vendor or builder.

White continued in business, as the Tribunal was informed by Philip Mayhew, the Assistant Manager of the Ottawa office of the Program. The "Kouk" home was built and sold with the closing to be on December 1, 1986. Upon the laying of charges and upon a

conviction being obtained under Section 22(1)(b) of the Ontario New Home Warranties Plan Act, White was fined \$5,000. In addition, the Registrar advanced the view that White lacked the technical competence to be a builder under Section 8(1) of the Act because of the many deficiencies in both residences.

The warranted repairs to the two residences were not completed by White. The "Kouk" residence had 15 pages of complaints attached to the Certificate of Completion and Possession and the original complaint letter of 50 pages set out more than 250 items. At the conciliation inspection on September 14, 1987, Paul Picard listed 120 items to be completed. White did not attend the inspection. While many of the items were minor and could be completed in several days, there were more major items of floor squeaks, lack of warm air supply in five rooms, and problems with the cedar decking and with the jacuzzi installation. Gas proofing, joist spans and attic insulation were three other concerns.

In his evidence, White reviewed the deficiency in the "Yuen" residence and explained that monies were owing to him for some \$40,000 worth of extras for an added 500 square feet of space with a fifth bedroom and a wraparound cedar deck. Until that sum was paid, he would not do the warranted work. Unfortunately there was no written agreement as to the extras in question, he said.

White believes that the payments by the New Home Warranty Program were excessive and stated that the "Kouk" residence was resold to another without the completion of the items for which the cash settlement was made.

The cross-examination of White did not begin on the late afternoon of January 10, and the hearing was adjourned at White's request as he would seek to have a lawyer with him, as well as two further witnesses. Two further days were agreed to and the hearing continued on July 29.

Upon White's late arrival, he stated that he could not afford legal counsel and would not have other witnesses. He believed that the New Home Warranty Program was determined to deny him registration and proposed to withdraw his application. The Chairman explained to White that the Tribunal had set aside two days to complete this hearing as had been requested, and that any evidence he would wish to bring forward would be welcomed.

The Tribunal decided to proceed on the basis that White had completed his evidence, and accordingly requested counsel for the New Home Warranty Program to summarize her case in White's presence so that he would be reminded of the reasons for the Proposal.

Counsel for the Program summarized the three issues before the Tribunal. First, that the "Kouk" residence was sold while White was an unregistered builder. Second, that repayments of monies paid by the Program for the "Yuen" and "Kouk" residences have not been made by White, which are breaches of the Vendor/Builder agreement. Third, that the lengthy lists of warranted defective items for the two residences show a lack of technical competence by White pursuant to Section 7(1)(d) of the Act.

As no further evidence was provided to the Tribunal by White, the Tribunal accepts the evidence of the New Home Warranty Program. Further to Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal and refuse the registration of L.J.W. Holdings Ltd. as a builder.

MICHAEL LATREILLE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
D.H. MACFARLANE, Member

APPEARANCES:
MICHAEL LATREILLE, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 17 April 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an application by way of appeal to the Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program dated the 24 day of August, 1990 to disallow a claim made by him against the Program for the return of a deposit upon an Offer to Purchase a house which transaction was never closed. The relevant facts are unusual.

In January of 1989, a company called Halton Hills Development Corporation was engaged in the building of 30 some houses on as many lots in a subdivision in or near the Municipality formerly known as Georgetown and now part of the Town of Halton Hills. At the time the Company undertook this enterprise, it had three principals: one Robert Latreille, who was its President and chief officer in charge of building operations, one Byron Daley, its secretary-treasurer and chief officer in charge of business operations, and a third man who subsequently ended his interest and association with the company so that throughout the period of the transaction with which we are concerned here, Robert Latreille and Byron Daley each owned 50% of the company and were carrying on its business.

The Applicant Michael Latreille was the son of Robert Latreille and was the sole principal in another company, Mi-Rob Development Corporation, with which company Halton Hills

Development Corporation entered into an agreement as a subcontractor to supply and instal certain hardware, mirrors and other fixtures in these houses as they were built.

When the enterprise was commenced, Halton Hills Development Corporation was registered as a builder with the Ontario New Home Warranty Program and guarantees were obtained by the Plan from the company's three principals for the performance by the company of its covenants and obligations to the Plan. These guarantees are still in place, that of Mr. Robert Latreille now being an obligation of his estate, he having died on June 13, 1989. All of the homes upon which construction was started which were built for sale in arms length transactions to third parties (at least 30 such homes) were duly enroled with the Program and the proper fees paid. Significantly, the home in question here on Lot 16 was never so enroled.

On January 30, 1989, a contract of purchase and sale was executed between Robert Latreille and Michael Latreille as purchasers and Halton Hills Development Corporation as vendor. The officer who signed the Agreement on behalf of Halton Hills Development Corporation was Robert Latreille. This was an Agreement for the company to construct a house on Lot 16 in the subdivision and convey the same to the purchasers on the closing date fixed for July 31, 1989 for a total price of \$341,975.00 which price Mr. Daley, who gave evidence at the hearing, said was the list or asking price for such a house without any favourable discount to these particular purchasers. Two sums were specified in the Agreement as payable to the vendor by way of deposits; first, the sum of \$10,000 payable with the Offer and secondly, a sum of \$10,000 when the roof was completed on the house. Neither of these sums were, in fact, paid directly by either of the purchasers to the vendor and at least the first of these was not paid in any way at the time required in the Offer.

The evidence submitted by the Applicant of the payment of these sums by way of deposit consisted of the following. In accordance with its contract aforementioned to furnish materials and services as a subcontractor to Halton Hills Development Corporation, Mi-Rob Development Corporation had a running account with that company as evidenced by a computer print-out which forms the last three pages of Tab 7 of Exhibit 5. This print-out shows invoices submitted for materials and work on certain dates, and payment by way of cheques therefor from Halton Hills to Mi-Rob on certain dates. On the second page of the print-out are identified two sums of \$10,000 credited to Halton Hills upon its then incurred indebtedness to Mi-Rob for monies which it retained and in turn credited to Robert and Michael Latreille's obligation to pay these sums by way of deposit upon their Offer to Purchase Lot 16.

During the course of construction of the house, certain extras were ordered to be supplied by Mi-Rob and the billings for at least some, if not all of these, are found on the same page 2 of the computer print-out identified as "Skylight" and three items "Extra". The print-out shows a final balance owing at its conclusion of \$14,965 by Halton Hills to Mi-Rob.

Before the house was completed Robert Latreille, as aforementioned, died on June 13, 1989. He died intestate and his son Michael Latreille subsequently took out Letters of Administration of his estate and is now legally his personal representative. It appears that Halton Hills was probably in financial difficulty with this subdivision before the death of Robert Latreille, but in any event these came to a head after that event.

Its operating line of credit with the Canadian Imperial Bank of Commerce guaranteed by Robert Latreille and Byron Daley was brought to an end and it could not pay its bills with the result that over \$500,000 worth of construction liens were filed against the lots still in its name, and it could not make title to close any more transactions.

Byron Daley and Michael Latreille met with the mortgagee, the Standard Trust Company which held first mortgages on all of the remaining lots, including Lot 16, and an arrangement was made with that mortgagee that to complete as many as possible of the remaining transactions (somewhere between 5 and 10). It would proceed to sell the same under Power of Sale proceedings. It did this, taking formal possession of these lots under its mortgage provisions and proceeding with sales by Power of Sale by which it disposed of almost all the remaining lots, but not of Lot 16. This lot remains at the present time in the name of Halton Hills Development Corporation, in the possession of Standard Trust Company and presumably with liens still registered against it.

On July 25, 1989, it had been apparent to the parties that the transaction could not be closed as stipulated on July 31 and it appears that they still contemplated trying to complete it. On that date, they entered into a written amendment to the Agreement extending the closing date from July 31 to November 16, 1989. This Agreement was signed by Michael Latreille as purchaser and on behalf of the vendor Halton Hills Development Corporation by Byron Daley. Before November 16 was reached other difficulties, as indicated above, had transpired and it became impossible to complete the transaction at all. There was evidence that an agreement was reached between the parties that the "deal" would not be completed. This Agreement was not in writing, but there is

written evidence properly admissible upon which it can be found. At the bottom of the Proof of Claim for the return of the deposit money from the Program, found at Tab 5 of Exhibit 5, we have in Robert Latreille's handwriting, the words "H.H. Corp has incurred financial difficulties and has been unable to meet closing dates. Mutually we have agreed to not complete the deal".

Also in a letter dated August 8, 1990 from Michael Latreille to the Program, found as Tab 7 of Exhibit 5 on the second page thereof, we find the words "...we, Michael Latreille and Halton Hills Dev. have come to an agreement to cancel our deal on the purchase of lot 16". It was the evidence of Michael Latreille that this agreement was made by himself as purchaser and Byron Daley on behalf of the vendor at a time after his father's death, but before he had taken out the Letters of Administration of his estate. In view of some of the conclusions reached by the Tribunal to be set out hereunder, nothing will turn on the point that the Estate of Robert Latreille does not appear to have been a party to this agreement. It is a fair inference from all of the evidence we have and the Tribunal finds as a fact that before he submitted this claim to the Program, the Applicant had entered into an agreement binding upon himself and upon anyone who might be subrogated to his rights, to cancel or not proceed further with the transaction to purchase Lot 16.

Michael Latreille then made an application to recover the \$20,000 deposit money from the Program under Section 14(1)(a) of the Ontario New Home Warranties Plan Act. This application as aforementioned, is found at Tab 5 of Exhibit 5 and the Program in a letter from Mr. Robert Hart, Regional Manager of the Program in Hamilton, to the Applicant dated August 24, 1990 found at Tab 8 of Exhibit 5, denied the claim. In his letter and in his evidence before the Tribunal, Mr. Hart said that he denied the claim because he saw the transaction between Halton Hills Development Corporation and Mi-Rob as some sort of business transaction which did not come within the jurisdiction of the Program and that the alleged receipt of the deposit money by the vendor did not come within his definition of a deposit.

There were a number of arguments advanced on behalf of the Program as to why the claim should be denied. The Tribunal has reached the conclusion that this claim against the Program should, in fact, be denied and it will be sufficient to set out our reasons for this without dealing with all of the arguments raised.

In the first place it is very significant that, while the company enroled all of the homes being built for third-party purchasers at arm's length with the Plan, it did not enrol the one on Lot 16. Mr. Martin conceded on behalf of the Program that

failure to enrol a house is no bar to a claim by a purchaser otherwise entitled to recover from the Program under Section 14(1)(a). The significance does not lie in that, but rather in the fact that the failure to enrol this house shows that it was clearly in the minds of all parties to the contract that this was a house which these people were building for themselves and, therefore, on the one hand, it fell outside the requirement to enrol and on the other, there was no point of enrolling it.

While, of course, the company was a separate legal entity with another one-half owner at the time, it is clear that when the purchasers entered into this contract on January 31, 1989, they did not bargain to get the protection of the Program or any compensation under Section 14 of the Act. The copy of the required form referring to the Ontario New Home Warranty Program attached to this particular Offer of Purchase and Sale, found at Tab 1 of Exhibit 5, has no information filled in any of its blanks.

Secondly, this was a case in which a third party, Mi-Rob Development Inc. made these two payments to Halton Hills Development Corporation totalling \$20,000 in consideration of that company acknowledging that it had received the same in discharge of the obligation of Robert and Michael Latreille as purchasers to pay these deposits under the contract and in consideration of its then proceeding to carry out its obligations to those purchasers under the contract. There is no doubt that the vendor later breached its contract with the purchasers in a manner which would give rise to a cause of action on their part for damages for breach of contract. But that is not the claim made here. We have no evidence of any proper measure of such damages and no claim is made on such basis. For all we know, house values may have fallen in the relevant period so that there were no damages. The claim here is for the return to Michael Latreille of the \$20,000 paid by Mi-Rob to Halton Hills Development Corporation on the ground of the failure of the consideration for which it was paid. The only party which could sue Halton Hills on this cause of action is Mi-Rob. It is not a claimant here and could not be one under Section 14(1)(a) of the Act, because it was never a person who entered into a contract with the vendor for the provision of a home.

Furthermore, it is the finding of the Tribunal that prior to July 30, 1990, the Applicant made an agreement with the vendor as set out above absolving it from all further obligation under the contract. We have no evidence whatever of any term in that agreement reserving to the purchaser any rights he might have to recover the \$20,000 deposit and the onus is upon the Applicant here to show why any attempt on his part now to sue Halton Hills Development Corporation for this money would not be defeated by the defence of this agreement. Therefore, even if he could have shown

that he was entitled to the return of this deposit at one time, he cannot now show that he has a cause of action against the vendor for this money and he fails to come within Section 14(1)(a) on this ground.

Mr. Martin referred the Tribunal to an authority which supports the Tribunal's conclusion. This was the case of Ross McDonagh and Joseph Palmerio against the Corporation designated to administer the Ontario New Home Warranties Plan Act reported in Vol. 8 CRAT Summaries of Decisions at p.62. The Tribunal denied the Applicant's claim and an appeal was taken to the Divisional Court, the decision of which is reported in Vol. 19 - CRAT Supreme Court of Ontario Decisions and Orders.

In this case, the vendor was the builder of a proposed condominium building which had entered into agreements to sell units to 58 purchasers including McDonagh and Palmerio.

The builder was unable to proceed with the condominium and turned the building into a rental project and returned deposits to 51 of the 58 purchasers not including these two Applicants. They sought the return of their deposits and brought their application to the Tribunal for an order under Section 14(1)(a) of the Act. Like the Applicant Latreille here, they were not able to produce cancelled cheques for their deposits and like him produced a letter from the builder, vendor, acknowledging the receipt of their deposits (see Tab 2 of Exhibit 5 herein).

The evidence showed that there was a debt of \$86,452.60 owing from the builder Marvo Construction Company to a forming contractor Leader Structures (Ontario) Ltd. and this account had been contrad and the obligation discharged by Marvo conveying the two lots in question to Leader. In turn, the companies' interest in these two units was transferred to Palmerio and McDonagh. The Divisional Court in dismissing the appeal at the bottom of page 145:

In our view, the plan under this statute is designed to guarantee damage or financial loss arising out of contractual relationships between a vendor and an owner in relation to a specific property. It was not designed to guarantee debts owing between such parties that have no bearing or relation to such a contractual relationship as exists in the present case. Debts between contractors and sub-contractors unrelated to a specific agreement of purchase and sale of a

specific property are clearly not within the scope of the legislation.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

JOHN LAUDONE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RONALD J. POIRIER, Vice-Chairman, Presiding
BARBARA NICHOLS, Member
D.H. MACFARLANE, Member

APPEARANCES:
JOHN LAUDONE, appearing on his own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 20, 21, 22 March; 2 April 1991 Thunder Bay

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Ontario New Home Warranty Program dated August 1, 1990 to disallow certain claims of the Applicant, John Laudone.

In August 1989, Mr. Laudone contracted with the builder North South Construction Ltd. to build a home on Lot 1, Wasco Drive, Terra Nova Subdivision in the City of Thunder Bay. The agreement is found at Tab 12 of Exhibit 19 filed on this appeal. The owner of the building company a Mr. Gigliotti and Mr. Laudone were friends before the contract was made and during the course of construction, they agreed between themselves that Mr. Laudone would be allowed to do some of the work and obtain credit therefor.

It appears among other things that Mr. Laudone was responsible for all the plumbing and the electrical package. Unfortunately, as construction progressed, the previous amicable relationship between the Applicant and the builder deteriorated to the point that they would no longer speak to each other except through their lawyers. On December 29, 1989, the real estate deal between the builder and the Applicant closed and the Applicant moved into his new home wherein he became aware of numerous defects which the builder refused to rectify. Mr. Laudone reported the problems to the Program and a conciliation report was prepared and a number of the deficiencies were corrected. With respect to the

remaining items in the Program's letter dated August 1, 1990, signed by N.M. Plichta, Regional Manager for Thunder Bay, the Program took the position that they were not covered by the Warranty Program since they were purely contractual in nature.

The issues before this Tribunal, therefore, appear to be whether section 13 and/or 14 can be applied to assist the Applicant and if so, what are the damages.

It is agreed by the parties that all the items in dispute are listed at Tab 17 of Exhibit 19 and at the outset of this hearing, it was agreed that items numbered 15 and 20 had been rectified.

At the outset, the members of the Tribunal are unanimous in deciding that the outstanding issues do not require any contractual interpretation, but are capable of being resolved on a clear reading of the contract which is found at Tab 12 of Exhibit 19. It is, therefore, our intent to examine each of the items on an item by item basis with reference to the evidence presented during the course of the hearing.

The first item in dispute was a piece of flex pipe which Mr. Laudone says should have been supplied by the builder to complete his clothes dryer attachment. The contract specifies "dryer plug-in and vent hole". We do not agree that this includes the flex pipe and accordingly direct the New Home Warranty Program to disallow this claim.

The next item is the doorbell assembly which both parties agree was never supplied. The position of the builder is that it is part of the lighting package for which Laudone was given \$350.00 credit. We do not agree. The contract specifies a doorbell was to be provided without reference to anything else and the lighting fixture allowance is a separate item. As such we find that Mr. Laudone is entitled to a doorbell or \$50.00 in lieu thereof.

The next item deals with the installation of an oak rail in a landing between the entrance stairs and the living room. This item was the subject of much evidence by both parties and the independent witnesses. The builder says he provided all the railings provided in the contract and the missing railing was not part of the contract because a wall had originally been intended to be in that spot with the result that the missing railing was required due to a design change not contemplated by the contract. No evidence of this design change was presented to the Tribunal. Furthermore, there was undisputed evidence that the absence of the railings was a danger and violated the Building Code. The contract is clear in that it provided "Oak railing on main entrance bi-level

stairs". We, therefore, find that Mr. Laudone is entitled to a railing of the same quality as on the rest of the stairs or a cash credit of \$350.

The next item involves the construction of a cold room. Mr. Laudone complains that there was no vapour barrier or ceiling insulation provided. The builder agrees and states that all he charged was for the extra concrete required to construct the cold room. The Building Code does not define cold room or its requirements. The contract as amended in Tab 12 by the document dated December 1989 merely states "cold room \$900.00". We, therefore, find that the builder has fully discharged his obligation as to this item.

The next item is Mr. Laudone's claim that the lot was not properly graded. This fact is not contested. The only contest is the amount required to rectify the problem. Mr. Laudone says it will cost \$300.00 because additional fill is required. Mr. Plichta says no fill is required and \$200.00 is more than enough. We accept Mr. Plichta's estimate and order that Mr. Laudone be credited \$200.00.

The next item revolves around an area in the front hall that has to be repainted due to some corrective drywall work that had to be done. The builder's position is that he is only responsible to correct the drywall problems and not the repainting thereafter. We disagree and find that Mr. Laudone is entitled to a credit of \$150.00 for the repainting.

The next item is not in dispute. The locking mechanism on the sidelight does not work. The builder refuses to correct the problem saying it is a manufactured item and is therefore subject to a manufacturer's warranty. He feels Mr. Laudone should go after the manufacturer. We disagree and order that the builder should contact the manufacturer or replace the item.

The next item is one of credibility. Mr. Laudone states that when he moved into his home, there was a dent on the frame of the octagon window. The builder's position is that it was done after all his work was completed. We believe that the dent was made during the construction period and award Mr. Laudone \$100.00 in lieu of its being repaired.

The next item surrounds the provision for a storm door. The contract calls for a "metal single door with glass at rear plus storm door allowance of \$200.00". The evidence was that no storm door was provided because a better main door was installed by the builder. Laudone agrees he got a better door but says it was a gift from the builder. We doubt very much that it was a gift and

find that Section 21 of the Regulations applies in that the substituted door was of better quality than the combination referred to in the contract. As such, the builder has fully discharged his obligation as to this item.

The next item claimed by Mr. Laudone is a shower curtain rod. Since Mr. Laudone was responsible for all the plumbing fixtures, we find him also responsible for the curtain rod.

With respect to the next item, the builder takes the position that no vanity tops were provided in the bathroom because they also are plumbing fixtures. We do not agree and award Mr. Laudone two arborite vanity tops or \$200.00 in lieu thereof.

The next item was perhaps the most hotly contested and the evidence of the builder and Mr. Laudone differs greatly. Mr. Laudone states that it was always his understanding that the house would be provided with triple glaze windows throughout. However, two weeks before closing he discovered that six of the slider windows were only dual pane. The builder claims that he merely installed the windows that Laudone selected. The evidence of the supplier would not tend to support the builder's evidence. Mr. MacMillan stated that Mr. Laudone came by to see the windows that were being installed, but there was no evidence to indicate that he personally selected them. MacMillan indicates that even though triple glaze were specified, his suppliers did not provide triple glaze sliders so six windows provided were dual pane Low-E. He further testified that these special Low-E windows would have a higher R value rating than the triple pane windows specified in the contract. He provided the Tribunal with a specifications manual that corroborated that fact. Again, we find that Section 21 of the Regulations is applicable in that the substituted item is at least equal in quality to the windows specified in the contract. The problem we have, however, is that the cost of the substituted windows appears to be \$125.00 less per window. We, therefore, find that Mr. Laudone is entitled to \$750.00 for this item.

Finally, the last item in dispute dealt with the medicine cabinets. The evidence was that the builder supplied Mr. Laudone with metal cabinets with oak trim. The contract called for "Oak style kitchen cabinets and oak style medicine cabinets". The builder agrees with respect to the kitchen that meant oak framing and oak doors and that is what he supplied. We cannot see any distinction with the medicine cabinets and order that the builder supply the same quality as in the kitchen or \$300.00 in lieu thereof.

GENE AND MAVIS LEGACY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES: BRIAN N. SINCLAIR, representing the Applicants

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 18 November 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants from the decision of the Ontario New Home Warranty Program to disallow claims for the failure of the builder to include a fireplace and a cold cellar in the house which it built and delivered to the Applicants at 6840 Sunrise Court in Niagara Falls, Ontario. The Applicants purchased the property pursuant to two Offers of Purchase and Sale; the first accepted on September 9, 1989 on a standard real estate agent's form of Agreement of Purchase and Sale and the second accepted on September 23, 1989 on a special form of contract provided by the vendor/builder, Palermo Homes Ltd.

Both of these documents contained provisions that each constitutes the entire agreement between the parties creating a potential for difficulty, but it was agreed by Counsel that there is no conflict between the two relevant to any of the issues with which the Tribunal is concerned at this hearing. The second of the two aforementioned Agreements contains the terms and has attached to it the documents with which we are concerned. It was an agreement to purchase the property for \$124,100 and to build a house upon it as stipulated in the agreement and in certain documents attached or to which references are made. Paragraph 17 of the Agreement provides:

17. CONSTRUCTION OF DWELLING Vendor agrees to construct on the Property a dwelling in accordance with the plans and specifications set out in the Schedules attached hereto and undertakes to complete the dwelling in a good and workmanlike manner. Notwithstanding the foregoing, Vendor may substitute other materials for those specified and may alter the said plans and specifications provided any such substitution or alteration shall not diminish the value of the Property or substantially alter the style of the dwelling. Purchaser acknowledges that any sketches, drawings or other plans are artists depiction only and that the Vendor's standard plans shall prevail and be applicable.

The only schedule attached to this agreement which is relevant to the issues before us is a document at page 8 thereof entitled "DESCRIPTION OF DWELLING". This document reads:

Vendor agrees to construct in a good workmanlike manner as per attached plans #83-25364CL048 an 1,103 square foot bi-level with attached garage as well as the following:

and goes on to state that building sizes are changed in red on attached plan and certain other items are removed or changed. There does not appear to have been any plan attached to this Offer and its Schedules, but there was a set of plans to which the Tribunal finds they refer.

The first of the aforementioned Agreements of Purchase and Sale indicate that the property was offered for sale through the vendor's agent "Metro Niagara Real Estate Limited - Remax Cadillac City Realty Ltd." The evidence established further that it was offered through a multiple listing, the vendor's representatives dealt only with the agent with whom it placed the listing and the purchasers dealt only with a representative named Macintosh of the second agent pursuant to the multiple listing.

It is the conclusion of the Tribunal that both of these agents were clearly established as agents for the vendor and the Tribunal finds that the vendor is bound by their actions as its

agents. Before the Applicants signed the Offers of Purchase and Sale, they obtained from Mr. Macintosh a set of building plans and made and kept photostat copies of these returning the originals thereafter. These plans consisted of five sheets as follows:

1a showing the front elevation and the right side elevation of the house, 2a showing the rear elevation and the left side elevation of the house, 3a showing the main floor plan, 4a showing the basement floor plan, and 5a showing a cross section of the house. It is to be noted that on sheets 1a, 2a and 3a, there is a reference at the bottom to design #83-25364CL048 being the same reference number as set out in the aforementioned "description of dwelling" at p.8 attached to the Offer. On sheet 4a, there is a reference number #83-25364CK048 and on sheet 5a, simply #83-25364.

The evidence indicated that the references "CL048" and "CK048" refer to two different plans for houses. On the set of photostats produced by the Applicants are shown on sheet 3a (Floor Plan for main floor), the changes in dimensions marked in red on the original from which the photostats were made increasing the area to 1103 square feet, but these changes are not noted on sheet 4a (Floor Plan of the basement level).

Further references must be made to these plans because, in fact, copies of the same with some material variations or changes were produced from different sources. The copy of sheet 4a produced by the Applicants copied by Mr. Legacy from the plans furnished to him by Mr. Macintosh shows the fireplace with a note "finished fireplace heatolator unit with fans" and also shows the cold room with a note as to certain specifications in connection therewith. The copy of sheet 4a furnished by the builder/vendor to the Program and produced by the latter is a copy of a different document being "basement plan #83-25364CL048." It shows that it originally had the same references to the fireplace as on plan CK048, but someone had whited out both the drawing of the fireplace and the note concerning it as found on CK048 and the cold room and the notes as to specifications concerning it are simply not shown at all. Neither is there shown on this copy the changes in dimensions of the aforementioned. Sheet 3a of the set of plans furnished by the builder to the Program does show the changes in dimension, but does not have the handwritten reference to 1103 square feet so obviously its not a copy of the same document from which Mr. Legacy made his copies.

Finally, Exhibit 10 is copy of sheet 4a filed with the other documents at the Building Department of the City of Niagara Falls. It is a copy of "Basement Plan 83-25364CK048" with some variations from that furnished by the agent to Mr. Legacy and

produced by him to the Tribunal. In the first place, this document does have the handwritten changes to the dimensions but does not have the reference to the 1103 square feet. In the second place, it has the same reference to a cold room and its specifications in connection therewith. In the third place, upon it someone has whited out the drawing of the fireplace but has not whited out the note "finish fireplace heatolator unit with fans". It was the evidence of Mr. Peter Palermo, the officer of the builder/vendor who dealt with the matter and gave evidence before the Tribunal that he included the copy of CK048 sheet for 4a with his plans filed at City Hall because he had "run out of copies of CL048".

Mr. Palermo also gave evidence that these plans were in a standard form available to builders and, indeed, anyone else who would pay the fee or charge to obtain copies.

The issue of fact which must be determined by the Tribunal is whether or not there were terms of the contract between the parties pursuant to which the vendor/builder covenanted to build his fireplace and cold room for the purchaser. In addition to the foregoing evidence concerning the written documents, we had evidence from both Mr. Legacy and Mr. Palermo on this point. It was Mr. Legacy's evidence that when buying this house, he was particularly concerned to have both of these items. He said that he was accustomed to make sausages at home and for this, he needed a cold room and that he always wanted a fireplace. He said that the before he made the offer for this house, he had obtained the copies of the plans from the agent, Macintosh, and saw that they included these two items as aforementioned. Before closing, he saw that these items were not built and he made a complaint to the agent, but he had to close because he had to move and needed a place in which to live.

This evidence is corroborated by letter dated May 2, 1990 from the agent Macintosh which states therein that during the negotiations regarding this purchase, he was given a set of building plans by Al Boone of Metro Niagara Real Estate (listing agent) from Peter Palermo of Palermo Homes Limited, showing in detail what type of house was going to be built on this lot. This letter goes on to state that these plans showed a fireplace and fruit cellar on the drawings not marked as optional as some other things were and that, after some negotiations, some things were changed and noted, but not these two items.

At the time he was dealing with these plans and deciding on the terms of the offer which he would make, Mr. Legacy did not notice the CK048 reference on sketch 4a different from CL048 on the other sheets. Finally he said he went to the builder Palermo about these two items and the latter would not discuss them with him.

The evidence of Mr. Peter Palermo was that he represented the builder and was its officer who had signed the offer. He relied particularly upon the wording of the "description of dwelling" on page 8 of the second above mentioned offer "as per attached plans #83-2534CL048 and 1103 square foot bi-level..." He said that a CL048 plan did not include either a fireplace or a cold cellar. He gave some other details which, with the foregoing, showed that he, and the company, believed that they were agreeing to build for the Applicants exactly what they did build and give to them.

However, as found above, both of the agents named in the first above mentioned offer were agents of the vendor in the making of this contract and the actions of Mr. Boone and Mr. Macintosh are actions for which the vendor as principal is responsible. At the most, the reference on page 8 of the Offer quoted above "as per attached plans #83-25364CL048, together with the discrepancies noted earlier in the various plans puts the matter into some doubt or ambiguity and, even if this is found to be the case, in circumstances such as this where all of the documentation comes from one side, that of the vendor, upon the **contra proferentum** rule, the issue should be determined against the vendor and the Tribunal finds that there was a covenant as part of the contract, binding upon the vendor to provide the Applicants with the fireplace and the cold room or cellar as part of their new house.

This brings the Tribunal to some questions of law. Upon this finding of fact, can the Applicants succeed in this proceeding against the Ontario New Home Warranty Program. To succeed the Applicants must bring their claim within the provisions of some part of either Section 13 or Section 14 of the Ontario New Home Warranties Plan Act. Looking first at Section 13, the Tribunal concludes as follows:

The claim does not come within Section 13(1)(a) because these defects are breaches of covenant on the part of the vendor and not the result of any unworkmanlike construction or defects in material, they do not render the house unfit for habitation and they constitute no breach of the Ontario Building Code. The claim does not come within Section 13(1)(b) as these items do not constitute major structural defects.

Neither do they come within Section 13(1)(c) because they do not constitute breach of any warranties prescribed by the Regulations. In the first place, the Applicants' complaints are breaches of covenant or contract, and not breaches of warranty. In the second place, the only warranties prescribed by the Regulations are found in Part 7 of Regulation 726 under the Ontario

New Home Warranties Plan Act. Section 18 provides a warranty against water penetration through a basement or foundation for two years and Section 19 which provides certain warranties in certain circumstances where there are delays in the completion of a house and the closing of a transaction. There are no warranties prescribed which cover the Applicants' claim.

Counsel for the Applicants argued that the provisions of Section 6 of the same Regulation 726 and particularly subsection (7) thereof, constituted such a warranty prescribed by the Regulation. This section follows the heading "Limits of Liability" and all of its nine subsections, in fact, limit the liability of the Program in different circumstances as set out therein. Subsection (7) reads: "liability in respect of the cost and completion of the home is limited to 2% of the sale price of the home of \$5,000 whichever is the greater".

It is the conclusion of the Tribunal that nothing contained therein creates or establishes any additional liability by way of warranty or otherwise. This subsection simply places, as does all of the other subsections of Section 6, a limit upon liabilities to which it is applicable where these have been established otherwise by the Act or Regulations. Counsel referred to a document published on May 14, 1990 by the Canadian Bar Association as part of its Ontario Continuing Legal Education which was a paper prepared by Mr. W.R. Hart, Regional Manager of the Ontario New Home Warranty Program in which he stated under the heading "WARRANTY CLAIMS"

When the purchaser takes title and becomes an owner, there are six areas of warranty coverage during the 5-YEAR period from date of possession for which claims can be made.

- (b) Completion of missing or incomplete work shown in the Purchase Agreement, to a maximum of \$5,000.00 or 2% of the purchase price, whichever is greater.

This is simply a restatement of the Regulation above mentioned in Section 6(7). The claim must first come within an established or prescribed liability of the Program before the question of placing a limitation upon it arises.

Subsections 2 through 6 of Section 13 do not add any additional warranty, but simply provide exceptions, limitations or

other provisions for dealing with those warranties established in subsection (1).

This brings us to Section 14 of which only subsection (1) establishes liability upon the Program and also of which clauses (b) and (c) have no application to this claim. Section 14(1)(a) reads:

a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

It is clear that the first part of this clause dealing with a situation resulting from a bankruptcy of the vendor has no application to this claim. Therefore, the disposition of this claim turns upon the interpretation which should be given to the remaining words and whether the Applicants' case comes within the provision where:

...a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from...the vendor's failure to perform the contract, the person...is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Neither counsel referred the Tribunal to any decision dealing specifically or precisely with this issue nor have we found one which does so. A key word to be considered is the word "person" used at the beginning of clause (a) and it must have been intended by the Legislature that there be a distinction between this use of the word "person" and the use of the word "owner" in section 13 and in clauses (b) and (c) of section 14(1). It is an owner which is the beneficiary of the warranties established in section 13 and in clauses (b) and (c) of section 14(1). An "owner" is defined clause (g) of section 1:

- (g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;

Vendor for this purpose is defined in clause (n) of section 1 as follows:

- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

This definition contemplates an owner acquiring a home from a vendor or his successor in title and, therefore, contemplates acquiring the title.

A purchaser who has closed his transaction and become an owner within these provisions can put forward any claim under section 13(1) or under section 14(1)(b) or (c). However, a purchaser under an Offer of Purchase and Sale who is not able to close his transaction because of the bankruptcy of the vendor or other failure on his part to perform the contract because a house is not built or for some other reason cannot make any recovery under these provisions.

It is the opinion of the Tribunal that, when all of these provisions are read together, it was the intention of the Legislature in section 14(1)(a) to provide a basis for the recovery of certain losses or damages suffered by a person who could not recover under section 13(1) or section 14(1)(b) or (c), namely, a person who had not been able to close his transaction as a result of one of the stated failures of the vendor and that section 14(1)(a) applies only to claims put forward by persons who have not been able to close their transactions and, therefore, cannot put forward claims as owners as defined in the statute. This conclusion is corroborated or supported by the words of Mr. Hart in the article quoted above where, in dealing with warranty claims he says that "when the purchaser takes title and becomes an owner, there are six areas of warranty coverage...for which claims can be made."

The Tribunal would comment that, upon the facts as established before it the Applicants may well have a claim against the builder/vendor in another forum but, if they wish to consider this, it is a question upon which they should seek legal advice from their own counsel.

The Tribunal also wishes to comment that builders offering to build homes for sale either directly to purchasers or through agents should take more care than appears to have been taken in this case with regard to copies of plans and specifications which are handed out and used for different purposes

in connection with the transaction. Furthermore, greater care should be taken to mark as "optional" upon plans and specifications those items which, in fact, are optional or intended to be optional among the provisions, terms and conditions, which are offered as the basis of a contract. A proper degree of care with these matters would probably have avoided the trouble and expense of this dispute.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

MR. AND MRS. R. LLEWELLYN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

S. AUSTIN, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 6 August 1991

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has heard the argument on behalf of the Program and noting the provisions of Section 15 of the Statutory Powers Procedure Act hereby accepts the argument submitted by Mr. Austin in respect to this application. Under these circumstances, the application will be dismissed rather than treating this matter as an abandoned appeal and the Tribunal therefore directs, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Program to disallow the claim of the Applicants.

PATRICIA LONG

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
STEPHEN PUSTIL, Member

APPEARANCES:
PATRICIA LONG, appearing on her own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 8 October 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an application by Mrs. Long pursuant to Section 14 of the Ontario New Home Warranties Plan Act for damages resulting from breach of warranty. The claim pertains to one item only, namely, the construction of a rear entry deck at the rear of the home off the family room which Mr. and Mrs. Long had understood would be constructed by the builder, but which never materialized.

It was admitted by Mrs. Long that there is no mention in either the Agreement of Purchase and Sale, nor in any of the relevant Schedules thereto, of the rear deck. Mrs. Long testified that either prior to, or at the time of entering into the Agreement of Purchase and Sale, she and her husband discussed the rear deck with the builder. When Mr. and Mrs. Long expressed concern to the builder about the fact that the rear deck was not specifically mentioned in the Agreement of Purchase and Sale, the builder told them that it was not necessary to mention it in the Agreement as all of his homes had decks. Unfortunately, Mr. and Mrs. Long accepted that answer from the builder and left it at that.

As to the specifications of the deck, the evidence of Mrs. Long was that it would be a pressure-treated deck in a choice of style to be selected by the Longs at the "appropriate time". But it appears that before the time to make the selection arrived, the contractor had disappeared. We note that the Certificate of

Completion and Possession executed by the builder does mention a rear deck, but does not set forth any of the details as to the type of deck, size or materials.

While the members of the panel have no doubt that Mrs. Long is telling the truth and that the discussions with the builder that she described did take place, the Tribunal can only grant relief if it finds that one of the warranties set forth in Section 13 of the Act has, in fact, been breached. The onus is on the Applicant to prove that there has been a breach of warranty on a balance of probabilities.

At the end of the evidence of Mrs. Long, there were no other witnesses to be called on behalf of the claimants.

Mr. Austin on behalf of the Program made a motion for the case to be dismissed for failure to satisfy the prima facie burden of proof in this case. Although the Program has the greatest sympathy for Mr. and Mrs. Long and for the position that they find themselves in, particularly in view of the fact that the builder cannot be located and, therefore, the possibility of successfully pursuing him for relief is very remote, the Tribunal can only grant relief where a claim falls within the parameters of the warranties set out in Section 13 of the Act.

We note that the Program has installed two concrete steps at the rear of the rear entry door which satisfy the requirements of the Ontario Building Code. There is no evidence that any of the warranties under Section 13 of the Act have been breached.

Accordingly, notwithstanding the sympathy that the Tribunal has for Mr. and Mrs. Long, it finds itself in a position where it is unable to grant the claimants any relief in this matter. The motion made on behalf of the Program is granted and the claim is disallowed.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

DANIEL AND VICKI MACPHERSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
ALBERT LONGO, Member

APPEARANCES:

ROBERT BANIK, representing the Applicants

STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 4 October 1991

Toronto

REASONS FOR DECISION AND ORDER

Daniel and Vicki Macpherson entered into an Offer to Purchase dated 31 August 1988 with Fram Construction Limited for the construction of a home in Whitby. During the succeeding months, Macpherson had an opportunity to view the house as it was under construction since he lived in the adjoining subdivision. In his evidence, the appellant said that the house took five or six months to build and as he watched it being built, he realized that it did not conform to the plan he had intended or expected.

He then complained to the builder's representative saying that what he was getting was a reverse plan or a mirror image of the house he had contracted to buy. Having been directed to one Barbara Cote, interior co-ordinator for Fram Building Group, he advised her the design was opposite to what he had expected. Ms. Cote eventually after consulting with the builder told him that under the Offer to Purchase, the builder was at liberty to change the plan and provide the mirror image of the same design.

Prior to closing on August 31, 1989, at which time Macpherson took possession, he told his lawyer of the situation and said the legal advice he received was to close and claim against the Ontario New Home Warranty Plan. The transaction consequently closed and at the same time the appellant executed a Proof of Claim for breach of the purchase agreement in which he claimed damages of \$20,000 from the Plan. The claim recites:

The claimant asserts that the Vendor/Builder is liable for Breach of Contract for the following reasons (specify the facts which lead to this assertion together with supporting documentary evidence):

Reversal of Plan of house as evidenced by attached survey and Draft Plan of house initialled by Vendor and Purchaser and Agreement of Purchase and Sale. Also please see attached.

3. CLAIM:

The failure noted above (paragraph 2) is considered a Breach of Contract on the part of the Vendor/Builder and

As provided in Section 6(1) of Regulation 726 to the Act I/We claim damages in the amount of \$20,000.00 (amount not to exceed \$20,000), consisting of: Refund of Deposit \$ _____
Other \$ 20,000.00

(the specifics of damages claimed must be set out together with documentation and other proof)

Date: 28/08/89 Claimant(s) "Daniel MacPherson"
"V. MacPherson"

PROOF OF CLAIM

RE: Daniel and Vicki Macpherson
95 Erickson Drive
Whitby, Ontario
L1N 8Z2

As a result of the reversal of Plan, claimants advise that:

1. They have had to replace fridge as previous fridge was right-hand door -- left-hand door now required.
2. Fridge and stove were a matched set so that they have also had to replace the stove.

3. The garage is now located closer to the corner.
4. The skylight was to have faced East for the morning sun, now faces West so gets afternoon sun resulting in the house being hotter.
5. The garage if constructed as per Plan would have shaded front of house, namely, study, vestibule and bedroom #3 from afternoon sun - now exposed to heat of afternoon sun.
6. The door from the garage to the house has more stairs than would have been required resulting in more stairs to climb and more space being occupied in garage by stairs reducing storage space.
7. House not as attractive and may result in reduced resale value.
8. They had a preference for Plan as per Agreement of Purchase and Sale.

The Certificate of Possession reflecting an inspection on August 29, 1989 alleges a number of deficiencies in the home and this document was signed by both Macpherson and the builder.

Some correspondence then took place between the solicitors for the builder and the Ontario New Home Warranty Program ending with a letter from the builder's solicitor to Macpherson which reads:

BERHOLZ, GORDIN & VINER

November 16, 1989

Mr. and Mrs. Daniel Macpherson
95 Erickson Drive
Whitby, Ontario

Dear Mr. and Mrs. Macpherson:

Re: Fram Construction Limited sale to MacPherson
Lot 57, Plan M-1520, Whitby

We are the solicitors (for) Fram Construction Limited, and have just received a letter from the Ontario New Home Warranty Program regarding your claim in connection with the reversal of the plan for the house at the above noted property.

This claim was a surprise to our client because there had been no indication at any time prior to closing that you objected to the siting of the house or the reversal of the plan.

In this regard, your attention is directed to paragraph 10 of the Agreement of Purchase and Sale, which provides that a reversed layout (mirror image) and various other changes will be accepted by you. This provision was drafted for inclusion in the standard new home Agreement of Purchase and Sale approved by the Toronto Home Builders Association to address the problems which are bound to arise when purchasers are permitted to select both the house model and elevation and the actual lot. Due to the configuration of individual lots, municipal requirements for variations in elevations and floor plans to provide a varied streetscape, municipal requirements to facilitate parking and allowance for hydrants, street lighting, etc, certain sitings selected during marketing may not be feasible.

We also note that only one set of elevations and floor plans is prepared for distribution to purchasers in connection with our client's sales and marketing program. Reverse layout drawings are not provided and Fram Construction Limited makes no representation that the artist's renderings will exactly correspond with the actual house once it is constructed. At no time did Fram Construction Limited contract to provide a house with a specific plan that would not be reversed, nor does the Agreement of Purchase and Sale contain any such provision.

You were certainly aware of the plan reversal well before closing. Since you have completed the purchase, there is nothing that our client can do. Fram Construction Limited cannot be liable for any claim made by you, whether or not you have suffered any specific damages.

Also, your claim indicates that you consider the plan reversal to be a breach of contract. Since there was no provision at the time of closing for any claim by you for the plan

reversal, your completion of the contract constitutes a waiver of any claim for breach of contract.

Yours very truly,

BERHOLZ, GORDIN & VINER
Per:

MARK H. VINER
cc: Ontario New Home Warranty Program
cc: Fram Construction Limited

On October 22 of the following year, the appellant requested a conciliation directing a list of deficiencies to the Program. After consideration of the file, Mr. Roger Adams, Manager of the Program's Whitby office, wrote to Mr. Macpherson as follows:

ONTARIO NEW HOME WARRANTY PROGRAM

December 17, 1990

Mr. & Mrs. D. Macpherson
95 Erickson Drive
Whitby, Ontario
L1N 8Z2

Ref. No.: 7471-133264

Dear Mr. & Mrs. Macpherson:

Re: Request for conciliation and claim for damages

Please accept my apology for the delayed response to your concerns.

I have now reviewed your file regarding the request for conciliation dated October 22, 1990, and your claim for damages which was re-submitted on October 22, 1990.

Based upon the documentation you have provided, for the damage claim regarding reverse plan layout, I regret to say that the Warranty Program cannot assist you with this claim.

I feel that the Vendor/Builder has met the obligations of the Purchase and Sales

Agreement, in that, the possibility of a reverse layout (mirror image) was identified in clause ten (10) and clause eleven (11) allows that the Vendor/builder "may alter the plans and specifications, provided that such substitution or alteration shall not diminish the value of the Real Property or substantially alter the Dwelling."

In my review of the file I also noted that there was no correspondence with the Warranty Program regarding your list of defects until your request for conciliation was submitted on October 22, 1990.

Under the provisions of the Ontario New Home Warranties Plan Act, all new homes sold in Ontario since December 31, 1976 have basic warranty protection against substandard workmanship, defective materials, Ontario Building Code violations and, major structural defects. These matters are covered by the builder for one year only commencing on the date of possession of the first owner. All claims arising out of the builder's warranty must be submitted in writing to the Ontario New Home Warranty Program during the first year of possession.

Your complaints do not appear to fall within the definition of a major structural defect.

Our records indicate that the builder's warranty has expired on September 1, 1990, and that no complaints were received by us during that period.

We have, however, written to your builder on your behalf, requesting that they check into your complaints.

We regret that we cannot take further action on your behalf, therefore we are returning your cheque (cheque #257), dated October 22, 1990 for the sum of \$50.00.

The Ontario New Home Warranty Plan Act provides that if you are not prepared to accept the findings of our evaluation, you may wish to

pursue the matter further by one of the following methods:

You may take your builder to court, take your builder to arbitration (address below), or you may wish to appear before the Commercial Registration Appeal Tribunal (CRAT). Should you wish to pursue the matter before CRAT, please contact the writer and I will provide the necessary information.

Arbitrator's Institute of Canada Inc.
234 Eglinton Avenue East
Suite 411
Toronto, Ontario Phone: 487-8433

Should you have any questions regarding the above, please feel free to contact me.

Yours truly,

Roger Adams, Manager
Whitby Regional Office
RA:pt
Enclosure MSD Definition

The matter has now come before this Tribunal to decide the issue of whether or not there was a breach of contract on the part of the builder, and if so, what damages if any were suffered by the appellants.

The operative document, of course, is the Offer to Purchase which forms a contract between the parties. No evidence was offered concerning the execution of the contract or whether Macpherson had read it, but it is to be noted he placed his initials at the foot of each of the five pages and accompanying schedules, together with his signature on the last page. On page 3 of the document in paragraph 10, we note the following provision:

The sitings and plans and specifications of the Dwelling including architectural details and exterior finishes may be subject to approval by the Developer or the Municipality. If any such required approval is not obtained, the Vendor may in writing terminate this Agreement within One Hundred Eighty

days of the later of the date of this Agreement or subdivision plan registration. In that case, the Deposit shall be returned without interest or deduction and this Agreement shall be at an end. However, the parties shall accept minor modifications which the Developer or Municipality may require, including walkouts, narrowed driveway entrances, decks, side porches or a reverse layout (mirror image).

This clause clearly and unequivocally permits the builder to provide a house with a layout opposite to that which the purchaser might have anticipated. What the appellant received was the mirror image of what he apparently expected to get, otherwise the home was almost identical.

Mr. Macpherson has claimed the sum of \$20,000 against the Program on the basis of a breach of contract on the part of the builder pursuant to Section 6(1) of Regulation 726 which reads:

A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

To succeed, however, he must bring himself within section 14(1) of the Act. This provides:

14(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The appellants, therefore, must prove any damages claimed arise from the vendor's failure to perform the contract. Did the builder in this instance fail to perform the contract? We think not. The appellants received virtually the identical house for which they contracted in its mirror image or reverse plan. They were aware in signing the contract that each of its provisions was binding on both parties. They were further aware before closing that the house plan was reversed since they had witnessed its construction and in Mr. Macpherson's words "they would pop over about once per month". He had also attended at the premises to examine the fireplace and later to select the colour for carpets.

In conclusion, despite his objection the appellant closed the transaction and it is immaterial whether this was based on some nebulous expectation of being compensated by the New Home Warranty Program. On all the evidence, therefore, we find no breach of contract by the builder or failure to perform and the claim for damages is hereby disallowed. (Re: Trayling 1992 CRAT - released January 10, 1992)

In addition to the claim for breach of contract was the appellants claim of breach of warranty involving certain items considered deficient. Evidence given by both Mr. Jean Kerr and Mr. Jim Hunter on behalf of the builder and the Program is to the effect that all items have been addressed. Mr. Kerr had been the site superintendent and testified that everything in his opinion had been done. Mr. Hunter, who had inspected the house on more than one occasion, said that all deficiencies on the appellant's list had been addressed.

There was, however, the issue of the skylight which the appellant alleges is scratched and the Program is directed to replace the glass, together with the left lower window which we found according to the evidence to be bowed or in the alternative, the Program shall pay to the appellant the sum of \$500 in full settlement of these claims. The remaining claims are hereby disallowed.

DR. RAMESH MAKHIJA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
JAMES GRAY LESLIE, Vice-Chairman as Member
D.H. MACFARLANE, Member

APPEARANCES:

DR. RAMESH MAKHIJA, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 30 January 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program disallowing certain claims made by the Applicant. The claims are in respect of the Applicant's home at 1557 Fair Avenue, Peterborough, Ontario. The Applicant and his family took possession of the home on September 9, 1986. The gross floor area of this two storey house is approximately 3600 square feet plus an additional 1800 square feet of finished basement space. The Applicant testified that his home is the largest house in the subdivision. The builder of the home is Halminen Homes Ltd. The Applicant asked the Tribunal to consider five different claims.

1. Heating and cooling system

The Applicant testified that the heating and cooling system has never worked properly. He testified that there is insufficient heat in the second floor bedrooms in the winter months and that the air conditioning system does not cool these rooms sufficiently in the summer. Dr. Makhija testified that there is a temperature variance of up to five degrees between the main floor and second floor. Dr. Makhija took the position that the cause of the problem is "faulty ductwork". Specifically that the ducts are too small and do not allow adequate air flow for a home of this size.

Dr. Makhija relied upon a letter from Murray Crowder Ltd., a heating and air conditioning contractor that he retained to look into the problem on his behalf. The letter states in part "I sized the ductwork and according to my calculations the return air duct is too small. Therefore not enough air flow through unit." Mr. Crowder recommended enlarging the return air duct. The Applicant accepted this advice as he did have some cold air returns enlarged or added. These did not solve the problem complained of. The Applicant did not call Mr. Crowder, the author of the letter, as a witness. The Tribunal had no opportunity to determine Mr. Crowder's qualifications to give this opinion, nor to determine how the opinion was arrived at.

On this issue the Program called three witnesses, Ray Johnston of Ray Johnston Heating Ltd. the subcontractor who installed the furnaces for Halminen Homes Ltd. in this subdivision, Kenneth Bodine an HVAC designer for Trent Metals Limited, and John Zerafa of Halminen Homes Inc. The Tribunal learned that the original HVAC design for this home called for a 25 kilowatt electric furnace. The ductwork was installed and the basement ceiling was finished prior to the installation of the furnace. In the meantime, Dr. Makhija dealt directly with Mr. Johnston, without any participation from Halminen Homes, to switch to a 90,000 BTU/H high efficiency gas furnace. The gas furnace was installed. Dr. Makhija complained to Mr. Johnston about the lack of heat on the second floor. Subsequently, a decision was made to upgrade to a 120,000 BTU/H gas furnace with a night set back thermostat. This furnace is now in Dr. Makhija's home.

On October 13, 1989, Messrs. Johnston, Bodine, Zerafa and Mr. Lorne Thurston representing the Program, attended at the home to inspect the operation of the heating system. Volumeter readings measuring air flow were taken for every open register in the home. A "CFM" rating indicating the velocity of air flow was calculated for each room or area in the house. These were compared to the "CFM" rating called for in the design specifications for the home. The results indicated many oversupplied rooms and undersupply in the upstairs bedrooms. In his report dated October 16, 1989, Mr. Bodine opined that the air distribution system in the home needed to be rebalanced. In his view, with proper rebalancing there should be no more cold areas. He notes that while at the home on October 13, 1989, by simply decreasing the air flow in some of the downstairs registers, he was able to increase to an adequate level the air flow in the bedroom that had the most serious undersupply. Mr. Bodine recommended the installation of higher quality air supply registers with adjustable balance stops.

By letter dated October 27, 1989, the Program required the builder to install the proper balancing system in order to balance the system to meet or exceed the CFM ratings specified in Mr. Bodine's report. The same letter also states that "when the inspection was done we found some cold air returns and heat diffuser blocked or partially blocked by furniture. May we suggest that the system will provide you with a better comfort level if all areas are cleared."

In December, 1989, Mr. Johnston 's representative attended at the home, replaced the air registers and balanced the air flow. On March 14, 1990, Mr. Bodine and an associate from Trent Metals attended at the home. Mr. Bodine observed that the recommendations contained in his report had been carried out and that the air flow into the second floor bedrooms was now adequate as confirmed by further volumeter readings taken on March 14, 1990. He also observed that furniture was still completely blocking or severely obstructing several registers.

Notwithstanding the replacement of registers and rebalancing that has been carried out in response to Dr. Makhija's complaint, Dr. Makhija has testified that the heating and cooling problem is persisting. However, except for his own testimony, he has failed to put forward any evidence upon which the Tribunal could find in his favour. The onus rests upon the Applicant to prove his claim on the balance of probabilities. In view of the extensive evidence put forward by the Program, the Tribunal is unable to conclude that this onus has been met. Accordingly, this claim is disallowed.

2. Water leakage into basement storage room

The Tribunal finds that this claim was not made within two years after the Applicant took possession of his home. Mr. Zerafa has, however, indicated that if there is in fact a leak at this location, the builder will fix it.

3. Grading - Water ponding in backyard

The Tribunal finds that this claim was not made with the warranty period and it is, therefore, disallowed.

4. Blueprint for the house

The Applicant is requesting that a copy of the plans and drawings for the home be provided to him by the builder. This is a matter between the builder and the Applicant and is not covered by the Program warranty.

5. Claim for \$500.00

The Applicant claims that the builder owes him \$500.00 for shower doors that the Applicant rejected and which were returned to the builder. A complaint as to the adequacy of the shower doors was lodged with the Program and the Program's inspector found them to be of acceptable standard. The Applicant chose to return them to the builder and to replace them with upgraded doors at his own expense. The claim for \$500.00 in respect of the returned doors is a matter between the Applicant and builder and is not covered by the Program warranty.

In summary, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs that the Ontario New Home Warranty Program disallow all of the Applicant's claims.

MR. AND MRS. M.I. MEMON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

M.I. MEMON, appearing on their behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 18 October 1991 Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Mohammed Memon contracted to purchase a house under Offer to Purchase dated 17 January 1989 from Woodheath Developments Ltd. They took possession of the property located on Griffiths Drive, Ajax on November 10, 1989.

Prior to closing the transaction, however, they complained to their solicitors about the staircase which they considered to be deficient in that it was not what they expected - a Scarlett O'Hara staircase had been their expectation. Their solicitors wrote to the solicitors for Woodheath, but received no satisfactory response to their request for an abatement of the purchase price and the transaction closed without a resolution of the issue. Mr. and Mrs. Memon thereupon demanded the Ontario New Home Warranty Program to rectify the deficiency. The Program, however, refused. Included in the list of complaints are twelve others which they now bring before this Tribunal.

With regard to the staircase, an examination of the Offer to purchase discloses no reference to a Scarlett O'Hara type of staircase and the evidence is that there was some mention of it by the salesman for the company as well as a reference to it in an account of the company's subdivision development in the Toronto Sun. The article, however, was not an advertisement paid for by the builder. The builder's plan for this particular house (Exhibit

6) it must be noted, shows a straight staircase and not the one envisioned by Mr. and Mrs. Memon which they sketched for the Tribunal and forms Exhibit 7. On all the evidence, we therefore cannot conclude there is any liability on the Ontario New Home Warranty Program for any deficiency alleged to be in the staircase provided by the builder. In our view, this is a matter between the appellant and the builder and the appropriate proceedings may be brought in another forum.

As a result of the number of alleged deficiencies, a conciliation was held at the premises on October 25, 1990, by Jill Borgeault on behalf of the Program with Mr. Memon and a representative of the builder present.

Mr. Memon had complained about cracks in the brickwork and on both the finding of the conciliation officer and the photos introduced in evidence by Mr. Memon (Exhibit 13), there are some obvious cracks in the bricks. The builder has undertaken to repair these and we hereby direct the Program to ensure the necessary work is done.

Mr. Memon in his evidence points out that the basement windows in his opinion look cheap and are not safe. The conciliator, however, said they met the Ontario Building Code requirements and were quite satisfactory. We, therefore, disallow this claim.

The builder had installed a rose wall to wall carpet with which Mr. Memon is dissatisfied because it is shedding. The evidence, however, by the manufacturer is that a carpet tends to shed loose strands for awhile when it is vacuumed but this will not persist and is not caused by any defect in the material. The manufacturer's representative said that the carpet in any event was guaranteed for a period of five years and we, therefore, disallow this claim.

There were apparently some squeaks in the floor which the builder had fixed and since there are still some which he finds particularly irritating, we direct the Program to ensure the builder will honour his undertaking to address them.

The next complaint involved a problem of moisture in some of the bedroom windows which had gathered and formed a stain approximately one-half inch across the sill. On examination, however, by both the builder and the conciliator no defects could be determined and the evidence is that the windows had been satisfactorily caulked. A representative of the supplier was called to give evidence and said that he had attended at the home on January 31, 1991 at 12:30 p.m. His observation was that the

house was warm and very humid with all the bedroom doors closed and blinds down past the windowsills. He pointed out that the rooms were damp with water stains on the sills and a degree of mould growing on one of the windows. He said the problem was one of condensation as a result of air not being permitted to flow through the rooms.

Having inspected the windows thoroughly, Mr. Walter Sirotich, a representative of the company wrote in his report dated February 18, 1991:

Upon further investigation, I found a small amount of condensation still visible, water, and water stains on the sills and wall below the windows, and even mould growing on other windows.

Further, I found from the inside looking at the outside caulking and glass stops, were clean even at the sill.

My conclusion is that the homeowner has a problem with condensation.

Condensation is caused by a too high amount of humidity of the air inside of the house. Warm humid air comes in contact with cold glass face, cools off, and condensation forms.

This is solely the responsibility of the home owner. This problem cannot be contributed by the design, manufacturing or installation of the window.

The evidence, therefore, compels us to disallow this claim.

Under the Offer to Purchase, the appellant received a number of brass items including a kick plate, house number, mail box, coach lamps and door handle. It appears the door handle has tarnished and the comment of the conciliator concerning this is simply that since these items are all exposed to the element and with ordinary wear and tear, it is not possible to continue to warrant them and they are no longer the responsibility of the builder. This claim is, therefore, denied.

Mr. Memon contracted for an outside deck and for which it appears he paid \$5,000 extra. It is 4'6 x 10' and is attached to the patio door. His complaint is that there are no steps leading to it and since it is only 18" above grade, no step is required. There is, therefore, no violation of the Building Code. We, therefore, disallow this claim.

The next item, the appellants insist be addressed is the repair of some cracks in the foundation. The Conciliation Report indicates the builder has repaired these at one time with an epoxy injection type compound from the inside. The appellant, however, wants the Program to dig around the exterior walls to determine if these cracks are permitting water to seep in from the outside. We see no necessity for this procedure without further evidence. The conciliator has reported as follows in his report of October 25, 1990:

The builder has repaired basement foundation cracks with an epoxy injection type compound from the inside. This repair is considered acceptable by the Warranty Program. Should there be any problems with the repair within one year of the date of repair or two years from the date of possession, the homeowner is to contact the builder as well as the Warranty Program.

The Program is, therefore, ordered to direct the builder to repair any further cracks within the time period specified by the Regulations.

A further complaint also involved the basement floor in which the appellant alleges a crack has appeared. On examination by the conciliator, a crack was noticed in the basement slab at the southeast corner and although there were stains evident, the owner has never seen water there. It is the opinion of the Program and the builder that this is a shrinkage crack. The builder, however, has agreed to repair the crack upon receiving access from the owner which had previously been refused. We accept the recommendation of the conciliator and the builder and direct the Program to carry out the repair.

Mr. Memon has also complained about the manner in which the stairs have been varnished. The conciliator on examining them said there were two coats of varnish on the hand rail and one coat on the pickets, and that the work was done in a good workmanlike manner. We accept this evidence, particularly in view of the photographs which were entered in evidence (Exhibit 9 and Exhibits 12a and 12b). They reflect no defects in workmanship or in

consistency in the application of the varnish. This claim is, therefore, disallowed.

The owner complains further of a leak in the roof in the area of the southeast corner of the front bedroom. Exhibit 14 which is a photo of the area does not reflect any area of discoloration or stain. But the Program has advised the owner that the builder has undertaken to make a further assessment of the matter. If the owner is dissatisfied with the builder's report or repair (if necessary), the Program is directed to ensure this item is corrected.

The last item involves a complaint about poor paint and insufficient lighting in the hallway. With regard to the lights, the evidence is that the area referred to is in the foyer which is lit by a fixture. The conciliator found the area sufficiently well lit and the builder confirmed that the electrical drawings were complied with. This item is therefore disallowed.

Mr. Martindale, the conciliator, could find no defect in the paint but pointed out that if there were any areas in the kitchen or hallway where the paint peels, the builder will be directed to repair them and we so order the Program to ensure this is done.

In conclusion by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Program is hereby directed to ensure the necessary repairs are effected to the following items: cracks in the brick work; squeaks in the floor; cracks in the basement wall; crack in the basement floor; and the leak, if any, above the bedroom ceiling.

MR. AND MRS. OSCAR MONTEIRO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
DAVID APPEL, Vice-Chairman as Member
JOHN HURLBURT, Member

APPEARANCES:

MR. AND MRS. O. MONTEIRO, appearing on their behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 25 January 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants from a decision of the Ontario New Home Warranty Program given by way of a Conciliation Report sent to the Applicants on April 2, 1990, and a letter dated May 23, 1990, following a re-inspection.

The Applicants bought their home at 21 Ellsworth Avenue in Richmond Hill, from the builder Marble Arch Investments Ltd. by way of an Agreement of Purchase and Sale made on April 8, 1987, with a closing date fixed for May 16, 1988. The Certificate of Completion and Possession indicates that the transaction actually did close on October 12, 1988, and the Applicants took possession on that day. There are a number of items listed on the Certificate to be corrected and a number to be completed. Also these and other items of complaint are discussed in subsequent correspondence among the Applicants, the builder, and the Warranty Program.

However, at the opening of the hearing the parties agreed that there were only seven items at issue at this hearing based upon complaints that:

1. The colour of the wooden finish on the cabinet doors in the main bathroom does not match the other doors on the vanity.

2. The door installed on the cold room in the basement does not match the other doors at the foot of the basement stairs.

3. The driveway was not properly graded or drained with the result that water accumulates at the garage doors and flows into the garage and freezes there in cold weather.

4. All but the top two of the steps in the main staircase are not finished in the same manner as these two top steps or as the steps on the stairs to the basement.

5. The brass door handle or latch on the outside of the front door is corroded and damaged in appearance.

6. The outside light between a back door and the garage should have had a two-way switch, so that one could turn it either off or on from either the house or the garage.

7. The front porch had a flat roof, rather than a sloped or peaked one as shown in a picture the Applicants were shown and a copy of which they signed when they chose the style of house to be built for them.

Re: The colour of cabinet doors in the bathroom

The evidence disclosed that the plans and specifications provided for a closet in the main bathroom and, after this house and several others of the same style in the subdivision were completed, it was discovered that these closets had not been installed. The builder contacted the purchasers in each case with a proposal that, instead of ripping out the finish of these bathrooms to install these closets, it would install a type of cabinet in their place which would have doors which would match the vanity doors opposite them. The Applicants here agreed to this solution. The builder proceeded to install this cabinet.

There was no dispute that the original doors on the cabinet were not proper and were changed by the builder. Herman Santos, Service Manager for the builder said, in his evidence, that they were changed twice. Mrs. Monteiro said that the final doors

installed, which are the basis of the complaint with which the Tribunal is concerned, are still darker in finish than the vanity doors and the match of the two is not good enough.

Mr. Santos said that the agreement to put in these cabinets specified that the undertaking of the builder was to match the doors as closely as possible and that the final doors installed do that. Mr. Jack Sutherland, the conciliator with the Program who dealt with this matter, said that when he saw the doors installed at the time of his first inspection he agreed with the complaint and ordered them replaced, but when he saw the present replacement doors at the time of his re-inspection, he agreed with the builder that it had now complied with its warranty. Finally on this issue, there were filed some photographs showing both sets of doors.

In order to succeed with this complaint, the Applicants must bring it within clause (a) of subsection 1 of Section 13 of the Act. There is no evidence that these doors violate the Ontario Building Code or render the house unfit for habitation or contain any defects in material so, for the Applicants to succeed with this claim, the Tribunal would have to conclude that in all of the circumstances, the installation of these present cabinet doors do not constitute construction in a workmanlike manner. The Tribunal does not find this to be the case and accordingly, there is no breach of warranty with regard to these cabinet doors and the Applicants cannot succeed with this claim.

Re: The cold room door

This complaint arose from the fact that the Applicants ordered substantial extra work to be done in the house, including an upgraded finishing of the basement staircase and a finishing of the lower hall. Altogether almost \$30,000 was paid for extras and over \$9,000 of this related to the upgrading and finishing of the lower staircase and the lower hall at the foot of the basement stairs.

The specifications attached to the original Agreement of Purchase and Sale under a heading of "LUXURY FEATURES" showed that interior doors were to be 800 series/Colonial doors. The extra work in the lower hall required the installation of two doors; one on each side of the cold room door and these extra doors are in fact 800 series/Colonial doors, the same as those in the upper part of the house. However, the cold room door is a solid flat door originally provided for the cold room.

The Ontario Building Code requires a cold room door to be of the quality of an exterior rather than that of an interior

door in a house. Photographs of the downstairs hall showing these three doors show that the whole of this hall, including the staircase, the floor and the additional doors are finished in an upgraded manner and that the cold room door, in the middle between the other two, does not have the appearance of being up to the same standard.

The Tribunal appreciates the fact, as aforementioned, that the Building Code requires this door to be up to the standard of an exterior door for a house, but it also notes that the picture of the front of the house which was filed in connection with the porch roof issue and a copy of which the Applicants were asked to sign at the time they entered into the contract, shows the front door of the house with panels the same as the 800 series/Colonial doors and, of course, this is an outside door.

Mr. Randy Goodman, Vice-President, Construction, of the builder said that the door installed was a solid flat door to meet the Building Code and he was not aware of an 800 series/Colonial door being available for the cold room door. There was some reference in the evidence to such a door having to be custom made if it were to be had.

The issue here for the Tribunal is whether, in the ordering of all this extra work and the finishing of the basement staircase and all of the lower hall in the upgraded manner for which they paid the extra money aforementioned, the Applicants were entitled to have this door upgraded to match the rest of the finished work, and whether, in these circumstances, the failure to bring this door up to the same standard constituted construction in an unworkmanlike manner and, therefore, a breach of warranty?

In considering all of the relevant evidence and particularly the wording of the orders for the extras, the substantial payment to get the finished lower hall and the appearance of this door which does not match, the Tribunal has reached the conclusion that the failure to install a door on this cold room of the same standard and quality as the other doors, and as the upgraded finish of the lower hall generally results in completion of this part of the lower hall in an unworkmanlike manner and, therefore, is a breach of its warranty required by Section 13(1)(a) of the Act.

Re: Grading and Drainage of the Driveway

The problems under this heading have changed as time has passed. At the time of the original complaint and of the inspection leading to the Conciliation Report, the driveway was not

graded or paved and the Program's conciliator simply ordered that this be done. When it was done, the drainage was not proper and, during heavy rains or the melting of a considerable quantity of snow, a substantial quantity of water would pond outside the garage doors and flow in upon the garage floor. In freezing weather, this would turn to ice so that the use of the garage was seriously impaired.

The builder came back in October of 1990, and affected certain repairs by way of creating a swale to the side and drainage off the driveway which, according to the witnesses for the Program, remedied the problem and which, according to the Applicants substantially improved it, but left it still in unsatisfactory condition requiring further remedy.

The witnesses for the Program admitted that they had not seen the site subsequent to the making of these repairs at a time when there was any quantity of water about. Mrs. Monteiro was particularly clear in her evidence, that the present situation still allows, when sufficient water is present, for water to cover the front half of the garage floor, being one-half inch deep at the front and tapering off toward the middle. She described how, this winter, there have been times when half the garage floor and a substantial area in front of the doors has been covered with ice creating a real hazard.

There could be some difficult questions here arising from the fact that the only decision from which the Applicants can be appealing at this hearing was made earlier when the complaint was different, and arising from the difficulty, on the evidence before us, of determining just what should be done now to correct the problem. However, to meet what the Tribunal has concluded should be done now, it is not necessary to go further into these matters or into the evidence in more detail.

Mr. Sutherland, on behalf of the Program, admitted that if the situation at the present time is not better than that described by the Applicants, it does not meet the Program's required standard. It, therefore, remains for the Program to determine properly just to what extent the present situation does or does not meet the required standard and, to any extent that it does not, take the necessary steps to bring it up to that standard.

To this end, the Tribunal has concluded that representatives of the Program should return to the premises and make such inspections or tests as are necessary to see whether the drainage from this driveway meets the required standards and, if it does not, to have the necessary steps taken to see that it does. This inspection should be done at a time when the Applicants can

be present and preferably when there is a quantity of water present from which results of their inspection and testing will be much more apparent.

Re: The Finish of the Main Stairs

This problem came about as a result of a certain chain of events. The first of these was the order for the extra work upgrading and finishing the basement stairs in the same manner as the main stairs so that both should look alike. I have already referred to the substantial extras ordered for this house and the substantial payment therefor. In the event this work of finishing the basement stairs was completed satisfactorily in itself and both stairs were finished properly with a coat of varnish and presumably appeared similar as intended. However, after the varnish was applied to the lower stairs, someone walked up or down before it was dry leaving tracks in the varnish. These tracks had to be obliterated and this was done with some sanding and the application of a second coat of varnish. Unfortunately, the second coat had the effect of creating a marked difference in the two staircases. Finally, to add to the problem of the finish of the main staircase, someone spilled or dropped something on its two top steps leaving marks which had to be removed and which were removed in the same manner by sanding and a second coat of varnish. This second coat of varnish also had the result of creating an appearance of these steps similar to the bottom stairs and in contrast with the rest of the steps in the main stairs.

The evidence indicated that this complaint will be remedied by the application of a second coat of varnish on the remaining steps of the main stairs and then all will be finished in the same manner. All of the causes of this complaint were the responsibility of the builder and the Tribunal is of the view that the Applicants should not have to bear the burden of it and that the builder should remedy it by applying a second coat of varnish to the remainder of the steps on the main stairs.

Re: The Door handle or latch

This item also included a claim for a brass light fixture in the front porch. This claim is based on an item in the aforementioned Schedule of "LUXURY FEATURES" attached to the Agreement and Purchase of Sale specifying among exterior features "Brass Exterior Package".

The Tribunal can dispose quickly of the claim for the brass light fixtures. There was no evidence, either in any documents or verbally that the exterior brass package was to include a brass light fixture. For what it is worth, the witnesses from the builder said that in every case in the subdivision of some 200 houses, no brass light fixtures were installed and no one else complained of this point to their knowledge. The Tribunal cannot find any breach of warranty on the part of the builder in installing this light fixture which he did, and the Applicants cannot require the Program to replace it.

We must also deal with the question of the damage to the door handle. Mrs. Monteiro said this handle looked very old and tarnished. Mr. Monteiro said it appeared corroded and suggested that this was caused by some substance from some workman's hands. Mr. Santos for the builders said that when complaint was made to it of tarnish, it had this tarnish cleared with some substance perhaps Varsol, which took off the tarnish. He said that they often had trouble with this type of brass plating and he had discussed it with his supplier. In order to ensure keeping away from this problem, apparently one has to go to solid brass which is, of course, much more expensive.

The Tribunal finds that in the result the door latch, which the builder delivered to the Applicants, was defective whether initially so or by reason of this cleaning with a strong substance which damaged the plating finish. The door latch should therefore be replaced, but, because of the prevalence of difficulty with this type of fixture without further warranty on the part of the builder.

Re: The claim for the two-way electric switch

There is no dispute as to the relevant facts concerning this one. The builder installed all of the light fixtures both inside and outside the house. The most convenient way to go to the detached garage is out a back door from the dinette to the garage. There is an electric light lighting this area and it is controlled by a single switch inside the house. There is also a light inside the garage, which is controlled by a single switch also inside the garage. Mrs. Monteiro put the complaint succinctly when she said that if she goes from the house at night to the garage and turns on the outside light, she cannot turn it off while she is out and if she comes home at night and comes from the garage to the house, unless the light has been left on, she must get into the house in the dark. The result is that when the Applicants leave the premises expecting to return with a car after dark, they make it a practice to leave this outside light on. A two-way switch

controlling this light from both the house and the garage would solve the problem.

While the Tribunal appreciates the point of the complaint, it is not able to find on this evidence a breach of the warranty contained in Section 13(1) of the Act and, therefore, cannot allow this claim.

Re: The Porch Roof

Also with regard to this complaint there is no dispute as to the relevant facts. At the time, they entered into the Agreement of Purchase and Sale and ordered their house to be built, the Applicants were shown and were asked to sign a copy of, a picture of a house with the name the "The Knightsbridge". This picture showed a porch over the front door consisting of a top, supported by columns from the base, with a ceiling over the porch and a roof on top with a slight pitch or peak rising to the centre. The house as actually finished, as shown in photographs filed as Exhibits, has a perfectly flat roof on this porch

There are some other differences between the original picture and the finished house, but this is the only one of which complaint was made by the Applicants. The witnesses for the builder explained that when they came to construct these houses, there was not room between the top of the porch and the bottom of the middle window on the second floor for a peaked roof with sufficient slope. Indeed, the bottom of the middle window is raised several bricks above the bottoms of the windows at either side in the house as finished, although in the picture they are shown as even with one another.

Mr. Goodman said that they changed the roof from the peak to the flat roof after a few houses were built because of the problem of keeping so flat a peaked roof from leaking. A peaked roof had to be covered with some sort of shingles while the flat one has a solid membrane which prevents it from leaking. He said that the flat roof was, in fact, more expensive. The Applicants, however, pressed their complaint saying that the peaked roof had a much better appearance and, particularly when they were required to sign the picture as being a picture of the house which they would get, they should be entitled to get it.

The Tribunal is of the view that the providing of a flat rather than a peaked roof for this porch was clearly a substitution within the meaning of what is now Section 20 of Regulation 726 made pursuant to the Act. The warranty provided in this Section, however, only applies to purchase agreements entered into after

June 30, 1988 and this one, made on April 8, 1987 does not comply and the Tribunal must disallow this claim on this ground.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs that:

1. The claim with regard to the colour and finish of the cabinet doors in the bathroom be disallowed.
2. The cold room door be replaced with an exterior type door of a standard and appearance similar to the series 800 colonial doors.
3. That representatives of the Program re-attend at the premises to make a re-inspection of the drainage of water from the driveway in front of the garage to determine whether it meets the required standard and if it does not, to order that the necessary steps be taken for it to do so. The Applicants should advise the representative of the Program of a time when water is present so that the extent of the complaint will be apparent.
4. That a second coat of varnish should be applied to the remaining steps of the main staircase so that all of the steps will have the same finish.
5. That the door latch on the front door should be replaced with an undamaged latch but, in the circumstances, without further warranty.
6. That the claim for two-way switches controlling the light, lighting the area from the back door to the garage, be disallowed.
7. That the claim with regard to the porch roof be disallowed.

GEORGE S. MONTEITH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES: GEORGE S. MONTEITH, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 28 November 1991 Toronto

REASONS FOR DECISION AND ORDER

The appellant George Monteith purchased a new home from Bramalea Limited builders and took possession on July 15, 1988. On his 12-month inspection report of July 5, 1989, he complained of a defect in the kitchen cupboards which had resulted in a certain bubbling effect on the shelves. All other items in the report appear to have been addressed and the only issue before this Tribunal is the alleged defect in these cupboards.

Monteith met with the builder who inspected the cupboards on September 7, 1989 and the following day one Tim Colley of Bramalea wrote to him as follows:

Bottom of cabinets - The cabinets that showed bubbling on the inside bottoms, are the result of water damage. Water damage is not covered under your Bramalea Limited Warranty. Enclosed is a pamphlet that was included in your Warranty Package. The area highlighted is pertinent to your situation.

For the reasons stated, there will be no further action taken by Bramalea Limited with regards to these items.

The document contained information concerning the maintenance of the cabinets and was published by the manufacturer Canac, Cellini & Signature cabinets. It contained the following advice:

Cabinet Interiors

CLEANING:

Clean with a damp, soft cloth and dry immediately with a dry, soft cloth

CAUTION: Cabinet interiors have a water-resistant top coat. Water or other liquids allowed to sit on the surface for prolonged periods may cause staining and/or bubbling. Ensure dishes, glasses, etc. are dry before storing in the cabinets.

The evidence is that it was a Canac cabinet that was installed in the Monteith home. Greg McKibben, customer service officer for Bramalea, said that of the some 300 homes his company had built in that subdivision, Canac Cabinets were used in most of them. He pointed out that the shelves were treated with a type of waterproof coating and the homeowner's manual was given to all owners as part of the pre-delivery inspection. This is the manual that cautions against placing wet glasses on the shelves. The witness stated that he had inspected 50 or 60 homes in the area and received no complaints about their cabinets.

On cross-examination, he could not say that Mr. Monteith had received the pamphlet or why if the shelves were treated with a waterproof material, they were not then waterproof. We note, however, that the pamphlet refers to a water resistant material and not waterproof and the manufacturer is simply directing attention to the limitations of the product. The witness further stated that when wet dishes are put on the shelves before they dry, then bubbling occurs even with Paris Kitchens.

The next witness one Vincent Bruno, customer service manager for Canac Kitchens said the box of the cabinet was made of a compressed material of 5/8 press board and the shelves of the same, but treated with a water resistant coating which is applied before the cabinet is constructed. He observed "if you drop water on it, you should dry it off". Canac, he said, buys the same materials from the suppliers as do the other companies in the

business. Mr. Bruno pointed out that waterproof and water resistant are two different things and press board tends to expand when wet.

On October 16, 1990, John Moffitt, a conciliator with the Ontario New Home Warranty Program met with the appellant together with a representative of the builder, a Mr. Sam Colavita. The meeting took place at the Monteith residence and its purpose was an inspection of the offending cupboards. In his evidence, Moffitt said he examined all the cupboards with particular attention to those holding dry goods and those in which glasses and dishes were stored. The cabinets containing dry goods, he said, were in perfect condition whereas the cabinet in which the glasses had been stored was blistered and this was common where water has been left unattended. His opinion had, therefore, been that the particular cabinet was not warranted since there was no evidence of a defect in materials. Had there been such a defect, it would have been evident in the other areas he examined. On cross-examination, he contended that if there was no defect in other areas of the cabinets, it must be in the use - such as leaving water on the shelf.

Mr. Moffitt's evidence was consistent with his conciliation report of October 16 which stated:

COMPLAINT - Inside of all cabinets bubbling.

OBSERVATION - Mr. Monteith pointed out that the bottom shelf in the kitchen cabinet wall units showed damage or deterioration of the surface finish. We observed this occurs only where the china and glassware are stored when removed from the dishwasher. Other shelving in wall cabinets and base cabinets remained in good condition where dry goods are stored.

COMMENT - We find no fault with the cabinets and conclude that the damage is caused by this particular usage.

Mr. Monteith has consistently maintained the cabinets were of inferior quality and the material used was substandard. He has also contended that flat paint was used instead of a waterproof covering. In support of his argument, he introduced a letter from Capri Kitchens Ltd. to the effect that the materials used in construction were press board and painted with a flat paint. A Mr. Rizik, author of the letter, observes that such material would not withstand normal wear and tear or everyday activity in a kitchen, including resistance to heat and water.

In our view, however, Mr. Rizik's opinion is not supported by the evidence. The cabinets are clearly not designed to withstand a consistent and daily application of water which lies on the shelf unattended. This is clear from the pamphlet concerning their maintenance and use.

It may very well be that Mr. Monteith is disappointed to find his cabinets are of a press board material instead of solid oak or walnut, but the evidence points to that as the standard of the trade. If one expects a higher grade of material, then it may be that one must contract for a custom made home.

With regard to the issue of warranty, it may be pointed out that only warranty with which this Tribunal is concerned is that provided by the provisions of the Act. Any other warranty is a matter of contract between the owner and builder or manufacturer.

The evidence before us leads us to no conclusion other than that it discloses no defects in the material of the cabinets or the workmanship to bring it within section 13(1)(a) of the Ontario New Home Warranties Plan Act. The appellant's claim will, accordingly, be disallowed.

LOUISE MOREL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES: LOUISE MOREL, appearing in person

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 16 July 1991 Ottawa

REASONS FOR DECISION AND ORDER

The appeal by the homeowner is in respect to the costs incurred by her in having a retaining wall constructed on the west side of her property in Rockland, Ontario, which the Appellant claimed was the only way that the property could be graded so as not to permit the accumulation of water against her home in accordance with the Ontario Building Code. The New Home Warranty Program contended that the appeal of the homeowner pertained to landscaping only or, in the alternative, non-completion of construction under the Agreement of Purchase and Sale which, under the Act, was limited to \$5,000 and for which completion matters the homeowner had been fully compensated.

The facts of this case indicate that the homeowner's house is sited four feet from the property line to the west and that a pre-existing house has been constructed on the property to the west on land at an elevation some four feet vertically above the elevation of the homeowner's lot. The house to the west is also sited four feet approximately westerly from the property line between the two houses.

The homeowner retained a registered landscape architect of some considerable years' experience who gave evidence before the Tribunal. This expert testified that there was a vertical height at the property line of between three and four feet and that, therefore, the only way in which the homeowner's property could be

graded to the west was by the installation of a retaining wall. The witness testified that if an attempt were made to comply with the Ontario Building Code by simply grading the homeowner's property away from the foundation of the homeowner's house to the property line, there would be such a slope produced that in a very short period of time there would be a slumping of the adjacent landowner's property on to the homeowner's property, thus destroying the grading and the drainage on the homeowner's property. This expert indicated that the only method of creating effective drainage and grading on the homeowner's site was through the installation of a retaining wall.

The conciliator on behalf of the Ontario New Home Warranty Program wrote to the homeowner under date of July 23, 1990 as follows:

"The house has been constructed lower than the adjacent property, and in order to ensure the adjoining property does not erode onto the affected property, it is acknowledged that a retaining wall will be required along the west property line."

(emphasis added)

The last paragraph of the Program's letter states as follows:

"In summary, it is acknowledged that a retaining wall will be required along the westerly property line, however it was not specified in the Agreement of Purchase and Sale. If the retaining wall did form part of the contract, it would be considered a 'completion item'. Since the maximum amount of \$5,000 has already been compensated to the homeowner, no further monies can be directed, pertaining to this item."

In her evidence before the Tribunal, the conciliator agreed with the expert evidence given earlier to the Tribunal that there would be a slumping of the neighbouring property onto the homeowner's land, but took the position that the only obligation of the Program under the warranty under section 13 of the Act was to grade the property away from the homeowner's dwelling and that the subsidence of the neighbour's land when it occurred would be the neighbour's problem to settle with the homeowner. With respect, the Tribunal finds this position of the Program untenable. To suggest that grading should be undertaken which inevitably,

either in a short or perhaps longer time, would cause a problem to the adjacent land, which the Program conciliator acknowledged was the obligation of the Program but that the Program would then have no obligation when the land of the neighbour subsided not only seems unreasonable but, in the view of the Tribunal, is contrary to the Ontario Building Code's requirement. The suggestion by the Program that money should be expended to produce an ineffective remedy and then abandon the homeowner and her neighbour to costly litigation and ultimate construction cost, particularly in light of the Program's letter of July 23, 1990, seems to the Tribunal to be preposterous.

In particular, clause 9.14.6.1 of the Ontario Building Code provides as follows:

The building shall be located and the building site graded so that water will not accumulate at or near the building and will not adversely affect adjacent properties.

On the evidence before the Tribunal, when the property of the homeowner so graded caused the neighbouring land to erode there would be, in all likelihood, water accumulating at or near the building located on the homeowner's property. In any event, there would be an adverse effect to the adjacent property.

The warranty contained in the Ontario New Home Warranties Plan Act under section 13 provides that there is a warranty to the owner

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

...

(iii) is constructed in accordance with the Ontario Building Code;

In the view of the Tribunal, it is clear that surface drainage and grading are required under the Ontario Building Code and the only way in which this could be effected on the evidence presented to the Tribunal by the expert witness and in fact concurred in by the Program was through the erection of a retaining wall. In the view of this Tribunal, there is a warranty in favour of the owner for non-compliance with the Ontario Building Code. In the view of the Tribunal in addition, because of the nature of the property, the builder had an obligation to so site the dwelling

on the homeowner's land by elevating the house or constructing a retaining wall that the warranty under section 13(a)(i) is also in effect in that, the home has not been constructed in a workmanlike manner nor is it free from defects in material. There is an obligation on the builder when dealing with property which is lower than adjacent property to make sure that the construction does not destroy the support of the pre-existing house.

The homeowner claimed against the Program her costs of installing a retaining wall in the amount of \$4,600. In the course of evidence it became apparent that, in order to insure proper drainage and grading, the retaining wall was only required to be four or five feet beyond the front of the house and approximately the same distance to the rear of the house. The homeowner, for esthetic reasons however, extended the retaining wall to the rear of the property. The homeowner acknowledged in a forthright manner that the reason for doing this was esthetic and not for the purposes of providing appropriate grading and drainage. She indicated that she had a quotation from the installer of the retaining wall for the required portion of the retaining wall in the amount of \$3,060. In her evidence before the Tribunal, the conciliator for the Ontario New Home Warranty Program conceded that this estimate of \$3060 would, in fact, be reasonable.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act the Tribunal overrules the decision of the Ontario New Home Warranty Program in disallowing the claim of the homeowner and directs the Ontario New Home Warranty Program to pay to the homeowner the sum of \$3060.00 in full compensation for the installation of that portion of the retaining wall required to bring the property into conformity with the Ontario Building Code.

ALI MOUSSAOUI and RAHME EL-MOUSSAOUI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JOHN HURLBURT, Member

APPEARANCES:
ALI MOUSSAOUI, appearing on behalf of the Applicants
STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 17, 23 December 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants from a decision of the Ontario New Home Warranty Program to disallow a claim based upon an alleged defect in the construction of a driveway into their new home. The original appeal was brought by the Applicant Ali Moussaoui only and the hearing was commenced on the basis that only he and the Program were parties to the proceeding.

At the opening of the hearing, counsel for the Program advised the Tribunal that an action had been commenced in either the District Court or the Ontario Court General Division against the builder and vendor of the home, Russ Howald Construction Ltd. of Kitchener and that this action had proceeded to the completion of pleadings, production of documents and examinations for discovery.

Counsel took the position that the Applicants could not proceed with both of these proceedings at the same time and that they would have to elect which to pursue. The Tribunal agreed with this submission and the Applicants undertook to discontinue their Court action and proceed with this appeal. It also came to light that Rahme El-Moussaoui was the plaintiff in that action and counsel for the Program requested that she be made a party applicant hereto so that she would be bound by the Order to be made by this Tribunal.

In dealing with this problem, Mrs. Moussaoui consented to be added as an applicant and gave her undertaking, as did Ali Moussaoui that they would have the Court action discontinued at once. The Tribunal then made an order as follows:

1. That Rahme El-Moussaoui be added as a party applicant to this appeal.
2. That upon the undertaking of the Applicants to discontinue the Court action, the Tribunal would proceed to hear this appeal on its merits.
3. That proof of discontinuance of the action satisfactory to the Registrar of the Ontario New Home Warranty Program be furnished within 30 days from the date of this judgement and, in the event that such proof is not furnished to the Registrar, the Tribunal directs that the Ontario New Home Warranty Program carry out its decision and disallow the claim.

The Applicants purchased their new home at 81 Mayfield Avenue in Waterloo, Ontario from the builder/vendor Russ Howald Construction Ltd. by an Agreement of Purchase and Sale dated September 23, 1989 for \$129,900. One of the standard construction specifications attached to the Agreement reads:

LOT:

Grading to approved grading plan, minimum 100 mm. (4") of existing topsoil spread, 760 mm (30") wide pre-cast sidewalk slabs to front door, 600 mm (24") wide pre-cast sidewalk slabs to secondary door, gravel driveway, 3 m. (10') wide for single garage, 4.8 m. (16') wide for double garage.

In a list of items in the Agreement to be included in the purchase price was "Paved Drive". The evidence indicated that originally the driveway was to be 10' wide. Arrangements were made to widen it first on the left hand side as one looks from the street to the house and the Applicants later entered into a contract with the subcontractor employed by the vendor to put in the driveway whereby it was widened on the other side by 3' from the street up to the porch in front of the house. It was alleged on behalf of the Program that this extra 3' of driveway was a

contributing cause of the water at the garage door.

Although there was a good deal of evidence given at the hearing concerning the construction of the driveway and whether it has a certain depth of gravel or crushed stone under it, and whether it has heaved unduly from frost in the winter season, the only alleged defect or complaint properly before the Tribunal for adjudication at this hearing was a complaint that the water pools at the garage door and, when cold enough, freezes there so that the door cannot be shut. Mr. Moussaoui stated that they have experienced this problem every time during the three years they have been in the house when there has been a flow of water from rain or melting snow followed by colder weather resulting in freezing. The first time was in February 1989.

On a request for conciliation form, dated May 2, 1989, Mr. Moussaoui listed as an item of dispute "1. Level of Garage floor being too low". At the opening of the hearing, Mr. Moussaoui told the Tribunal that the only concern was with the level of the garage floor, and the drainage or flow of water away from the garage door.

The evidence upon which the Tribunal must reach its conclusion on this issue is the following. It was established that this house and the adjoining houses in the development were built upon land which had formerly been a gravel pit and when the contour of the land was smoothed to permit the construction of these homes, there was a general slope of the land from high ground some distance behind the house coming down to the street in front of it, and also some lesser slope of the land in front of the house which was crossed by the driveway from higher ground on the right as one looks in from the street to lower ground on the left and across the adjoining property on that side.

In the course of dealing with their problems, the Applicants had an inspection made by the Engineering Department of the City of Waterloo which had a survey group attend and make certain findings which are set out in a written report dated November 13, 1990. These findings were as follows:

A city survey crew was on site to establish the existing elevation of the garage floor and to check for a slope towards the road allowance. It was established that the existing garage floor is at an elevation of 1084.4 feet. The grading plans as approved by the city required an elevation of 1085.2 feet. Therefore, the garage floor is approximately 9.5 inches lower

than the approved design. It was also established that the elevation of the sidewalk (location of outlet for water runoff) is 1083.9 feet. Therefore there is 6 inches of available fall from the garage floor to the sidewalk. It was also established that a ridge has formed in front of the garage area. This ridge is up to 2 inches higher than the concrete floor elevation and appears to be the cause of the water entrapment and subsequent freezing during the winter months.

A visual examination of the existing asphalted area revealed that the entire driveway has heaved. It would appear that an insufficient aggregate base was installed prior to placement of the asphalt. A minimum of 4" of granular materials should have been placed for drainage purposes to prevent heaving, prior to the asphalt installation.

Therefore, we recommend that the problem be resolved by replacing the entire driveway. This solution would be substantially cheaper than installing a catchbasin. Also it would resolve the heaving of the entire driveway whereas a catchbasin would only address the ponding in front of the garage.

The Applicants filed two photographs both taken in the winter time, one looking toward the garage door from outside and one from inside the garage of the area just inside and just outside the door, and both clearly show an accumulation of ice in a substantial area at the garage door both inside and outside. The Applicants also provided a sketch which shows a ridge in the paving of the driveway running in a curve from the porch in front of the house, which is at the right of the driveway as one looks toward the house, toward the garage and toward the other side of the driveway at the left hand side as one looks toward the house.

It was the evidence of Mr. Moussaoui that the fall for water to run from this ridge was both ways from its peak so that the water on the long slope from the ridge to the street and toward the next adjoining property runs away from the garage, but that on the short slope towards the garage door runs toward the door

itself, and the quantity of water which pools there is substantially increased by the fact that all of the water which comes around the house and around the porch from a good deal of land which is higher and drains that way, as aforementioned, comes onto the driveway on the garage side of the peak of this ridge.

Two witnesses were called on behalf of the Program, Mr. Ken Rose, a conciliator who inspected the property, conducted the conciliation, and was responsible for the decision and report; and Mr. Russ Howald, the principal of the builder/vendor. Both of these stated that there were no defects or breaches of the Ontario Building Code. Mr. Rose said that he did not see any ridge and he could find no fault in materials or workmanship and no violation of the Building Code. He also said he had trouble with the statement in the City's report that there was insufficient aggregate base under the driveway. His observations were all based on a visual inspection. He took and filed a large number of photographs, none of which show any quantity of water or ice on any part of the driveway. Some of them do show that the additional three feet or so added to the driveway from the street to the porch does slope toward the rest of the driveway as does the land for some distance on that side of the driveway. Mr. Rose gave the opinion that the addition to the driveway by the Applicants increased the water flow and was a cause of the Applicant's problems.

Mr. Howald said that there were 386 houses in the subdivision, all with driveways and this is the only one which was the subject of any complaint. Most of Mr. Howald's evidence concerned the construction of the driveway, how much aggregate was placed under it and a dispute as to whether Mr. Moussaoui had asked his superintendent if he could arrange for the additional 3' which he later had added. He also said that in an attempt to settle the dispute, his company and the subcontractor agreed to provide the Applicants with a new driveway. The offer was not accepted and has been withdrawn.

On all of the evidence, the Tribunal finds that there is a warrantable defect which results in the pooling and freezing of water at the garage door, but this defect is not the height of the garage floor as set out in the request for conciliation. The Tribunal does not find any other warrantable defect in connection with the construction of this driveway and it finds that the addition of the extra 3' at the side arranged by the Applicant with the subcontractor is not a contributing cause of the problem of the water pooling at the garage door as alleged on behalf of the Program.

While the city survey crew found that the garage floor

was approximately 9 1/2" lower than its approved design, it also found that there was 6" of available fall from the garage floor to the sidewalk, and there is also some fall as well the other way to the property next adjoining on the left as one faces the house. This is ample fall to drain away water on a paved surface if that surface is constructed properly.

The addition of the 3' or so does not affect the problem at all because all of the water coming from that direction over this part of the driveway flows across it on the side of the ridge sloping to the street and the adjoining property. It is only the water which gets on to the driveway on the garage side of the ridge which flows the wrong way and pools at the garage door, and this addition only went as far as the porch so that no water from it gets on to the driveway on the garage door side of the ridge.

We have noted above that there was a good deal of evidence otherwise about the driveway, but upon it the Tribunal cannot find any other warrantable defect. Mr. Howald stated that the aggregate base is a minimum of 6" and acknowledged that he did not himself see it. Mr. Moussaoui said that there was not enough aggregate before the time they put on the top, that he came home to find them putting on the top so he did not see what they put under it. There is a statement of the City's Engineering Department report set out above but there is no indication that any test was made to determine what was under the pavement. No finding of any warrantable defect in the driveway can be based upon this evidence. In any event, it is questionable whether any such finding upon any issue other than that of the water pooling at the garage door should be made here in view of the statement at the opening of the hearing that this was the only issue to be determined. As aforementioned, the Tribunal finds the existence of this ridge up to 2" higher than the garage floor level across the driveway a short distance from the garage floor does constitute construction not performed in a workmanlike manner and also constitutes a breach of section 3.1.15.1 of the Ontario Building Code:

3.1.15.1 The building shall be located and the building site graded so that water will not accumulate at or near the building and will not adversely affect any adjacent properties.

and also of section 9.14.6.1 thereof which is to the same effect.

The written and verbal evidence which was given to the Tribunal as to the costs of doing certain work on the property was not helpful as it dealt with a more substantial system or plans for

remedies than the Tribunal thinks necessary, including the installation of a catchbasin and the replacement of a complete new driveway. It is our view that all that needs to be done is to have a portion of the driveway near the garage doors removed and replaced with one whose surface slopes steadily away from the building down the 6" of fall to the sidewalk and the fall to the adjoining property.

Therefore, pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to have the necessary work done to render the slope of the driveway a consistent slope away from the garage door toward the street and the adjoining property. This work should entail refinishing only so much of the driveway as is necessary to ensure drainage of water away from the garage door.

KERRY T. MOYNIHAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN CORSI, Member

APPEARANCES:
KERRY T. MOYNIHAN, appearing on their behalf
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 17 October 1991 Ottawa

REASONS FOR DECISION AND ORDER

Kerry and Helene Moynihan purchased a new home from Minto Developments Inc. which was constructed at 1650 Autumn Ridge Drive in Gloucester, Ontario. They took possession of their home on August 31, 1990.

Some 28 items were noted on the Certificate of Completion and Possession as requiring correction or completion. Six lengthy lists of complaints were submitted to the New Home Warranty Program from August 27 to February 25, 1991. A conciliation inspection took place on March 19, 1991 and ten items on the "A(1)" Schedule have been attended to by the builder. There were 14 items on the "A(2)" Schedule; and Mr. Moynihan has appealed two of those items to this Tribunal.

Paul Rochon has been a conciliator with the New Home Warranty Program for 15 months and earlier had been a service manager for 5 years with an Ottawa builder. As a witness for the New Home Warranty Program, he reported on the two present outstanding items as set out in the Conciliation Report of March 19, 1991 as follows:

11) Complaint DRIVEWAY

Observation A 30" x 30" patch in the asphalt driveway was present on this day. It was observed that a slight separation between the original asphalt and the patch is existing. Also, there is a slight difference in elevation. It is the Warranty Program's opinion that this is due to frost heaving and will return to it's original state in spring. Therefore, the Warranty Program cannot warrant this complaint.

12) Complaint BLEACH STAIN ON KITCHEN CUPBOARDS

Observation It was observed on this day, that the kitchen cabinets are of solid oak with a white bleach stain. Some areas are whiter than others due to the fact that oak has solid and open wood grains. This is why white areas are more pronounced than others. Also, bleach stains are more like a paint than a stain. No defect in workmanship or materials was observed and therefore, this cannot be warranted.

He provided eight photographs of views of the pre-finished cupboard sections as assembled in the Moynihan's kitchen. While a cracked oak veneer strip had been replaced by the builder as an "A(1)" Schedule item, he said that the builder had not been contacted by the Program to do any other touch-ups. He saw no defects in workmanship or materials and, therefore, denied that any warranty issue arose as a result of the present appearance of the kitchen cabinets.

The second witness for the New Home Warranty Program was Phil Mayhew, who is the Assistant Manager of the Ottawa office and who for nine years had been a conciliator. He attended on a second inspection and wrote a decision letter on April 25, 1991 which referred to these two concerns as follows:

11) Complaint DRIVEWAY

Observation The repaired area of the asphalt driveway is not acceptable. The area will be redone. As explained, if a repair has been done in a good workmanlike manner then it is acceptable. The Warranty Program cannot demand a builder to replace the entire driveway if the repair is acceptable.

12) Complaint BLEACH STAIN ON KITCHEN CUPBOARDS

Observation The finish on the kitchen cupboards is acceptable.

Mayhew had seen the edges of the first repair patch as fraying and directed that repairs be made to the driveway. This was done and the present patch is now three feet square. On the morning of the hearing, he and Rochon visited the home and they both reported that the repairs were well done and that there are no defects in material or workmanship in this repair. On cross-examination, he agreed that neither he nor Rochon had been present when the repairs were done. He noted that the policy of the Program is to guarantee any such repairs for one year. From Moynihan's two photographs of the driveway area, Mayhew noted that the patch area was a darker colour than the original driveway, but said that the colour would blend in somewhat over time.

Mayhew said that for seven years, he has had a hobby business of cabinetry and sees no defects in the Moynihan kitchen. He explained that the milky type of bleach stain is wiped off the cupboards which are then lacquered.

He said that the natural wood will absorb the stain in differing amounts depending on the closeness of the wood grain, and that there may also be a final reddish cast to the oak. Since there is less grain in the veneer gables of the cupboards, the stain may be absorbed in a different pattern than that which the solid wood doors will do. Mayhew found the appearance of the kitchen to be very nice and the shading differences to be within reasonable tolerances for a natural wood product.

Mr. Moynihan presented 16 photos of the kitchen cupboards together with two photos of the driveway which he commented upon in his evidence. His kitchen photographs were taken somewhat closer to the surfaces than were Rochon's. He said that some touch-up work had been done in the home by a craftsman from the builder and that he wanted some ten additional areas attended to which he thought would take one day's time. The issue of the cupboard finishes was first referred to in the Certificate of Completion and Possession. The driveway was paved in the Fall of 1990 so that both concerns are agreed as having been documented within the first year of occupancy. He noted that many other items were well attended to by the builder and that he only seeks a reasonable completion of these two items since he has spent \$250,000 for this home.

For the driveway, he noted that the first repair was in an area just two feet from the curb line. This had sunk in from 1/2" to 1" over the winter and the second repair is level, in a larger section and of a darker colour than the original paving. He wants the entire double driveway repaved to ensure that the work is sound and for aesthetic consistency of appearance.

In conclusion, counsel for the Program stated that the total effect of all of the kitchen photographs was to show a satisfactory package with insignificant variances in the finishing of natural wood; both solid pieces and veneer. In her opinion, there are no defects in materials or in workmanship which had been proven by Mr. Moynihan who has presented only his personal preferences without any support expert evidence. Since these are pre-finished and then installed standard cabinets, she said that Mr. Moynihan can not expect a perfect custom-built result.

She further stated that the second repairs to the driveway are sound and again show no defect in materials or workmanship. The repair has an effective one year guarantee. The patch does exist and can be seen, but this is an improvement and all that should be expected by Mr. Moynihan.

The Tribunal concludes that the driveway patch is likely in the road allowance and that any repairs if completed by the City of Gloucester to such a location would look just as this repair does. While the owner could put a sealer coat on the entire driveway and thereby mask the repair patch, there is no necessity for the New Home Warranty Program to respond further to this complaint in that the repair appears to have been well done.

The Tribunal concludes that the finishes on the kitchen cupboards are within normal tolerances to be expected for natural wood products.

With respect to both complaints, the Tribunal can not find any defects in material or workmanship and, therefore, can not find that either of these complaints is warranted.

Accordingly, pursuant to the power vested in the Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow both claims in this appeal.

NALEENE J. PATEL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES: NALEENE J. PATEL, appearing on her own behalf
CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 25 July 1991 Toronto

REASONS FOR DECISION AND ORDER

Mrs. Naleene J. Patel purchased a new home at 13 Glencrest Drive in Stoney Creek from New Venture Homes Limited and took possession on October 7, 1988.

There were numerous complaints, some 41 in all, alleging deficiencies in workmanship and materials all of which seemed to have been properly addressed after conciliation with the exception of three which now become the subject of this appeal.

The Conciliation Report of August 3, 1989 reflects two items, one in Schedule "A(1)" and the other in Schedule "A(2)". They are:

- "A(1)" 2. IN BOTH BATHROOMS THE COUNTER TOPS HAVE TO BE CHANGED TO THE DESIGN CHOSEN: Builder to replace countertops in ensuite and main bathroom as specified in selection sheet.
- "A(2)" 2. THE KITCHEN CABINETS HAVE TO BE FINISHED: It is the opinion of the Ontario New Home Warranty Program that this item is considered a contractual dispute and the Warranty Program cannot assess liability for this complaint.

The third item, that of the size of the whirlpool was not considered in conciliation since at that time, it had not been reported to the Program.

In her evidence, Mrs. Patel said that the countertop was, as the result of the conciliation, changed and was now satisfactory except that it was beige and the floor grey. The complaint was purely aesthetic since she said "Beige bathroom with grey floor. It just doesn't look good. This is our main bathroom." She admitted, however, that she really did not expect the whole bathroom tile floor to be torn up, but that perhaps the cost of a rug would be sufficient redress.

Andy Richters, senior conciliator for the Program's Hamilton office, said that the countertop was changed by the Program since the owner did not want a grey countertop, but a beige one expecting a beige bathroom. He further said that, in his opinion, the beige top did not clash with the grey floor.

We find, however, on the evidence the complaint of Mrs. Patel to be justified since the Program undertook initially to change the top and find her request not unreasonable. We, therefore, have concluded that a rug would be a satisfactory resolution of this claim and hereby order the Program to compensate the owner for its costs in the sum of \$250.00.

The second issue is one of unfinished kitchen cabinets which the Program deems to be a contractual matter between the owner and the builder since there is nothing in the Agreement of Purchase and Sale referring to the length of the cabinets.

Both Mr. Richters and Mark Roccatagliata for the Program who inspected the home admit there is no cabinet above the refrigerator although there appears to be a space for one as a continuation of the rest. They pointed out that the contract did not specify the number of cabinets to be installed and, therefore, it was purely a matter of contract between the builder and Patel.

On the evidence, however, we view it in a different light since there is a bulkhead installed above the refrigerator reserving an empty space of some 16", and we conclude the only reason for the bulkhead was that a cabinet had been intended to be installed and the builder had failed to complete the work.

We, therefore, direct the Program either to install the missing cabinet or in the alternative award the owner the sum of \$150.00, the estimated cost of installation.

The third issue was the owner's complaint that the whirlpool was only 5' deep when the contract called for a 6' foot pool. We note, however, that this is a complaint which should have been directed to the Program in writing within the first year, but was not made until October 16 and received by the Program on October 18, 1989. Since it is beyond the one year, we do not find it necessary to deal with it and this claim is, therefore, disallowed.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to pay to the owner the sum of \$250.00 in full satisfaction of item #1 and the sum of \$150 in satisfaction of item #2, or in the alternative with regard to item #2, the installation of a kitchen cabinet above the refrigerator; and item #3 is hereby disallowed.

MR. AND MRS. STANLEY PATERACK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES: MICHAEL F. PETERSON, representing the Applicants

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 27 May 1991 London

REASONS FOR DECISION AND ORDER

Stanley and Ann Paterack purchased the property at 119 Hedge Maple Path in Chatham from Bouma Builders Inc. and took possession of the property on October 28, 1988. The purchase price was \$180,850, and a letter with certain complaints about the house was sent by Anne Paterack to the builder on May 29, 1989. The New Home Warranty Program received a copy of the letter and, after further correspondence, a request for conciliation led to an inspection on August 2, 1989. The owners were present together with Ray Bouma and his son-in-law Mike Van Den Sluis who are the President and Vice-President of the builder corporation.

There were two complaints found by Gary Snively to be warranted on Schedule "A(1)", namely:

1. FLOOR IN FOYER UNEVEN (SUNK): The Builder to repair and/or replace only the main floor in the foyer and adjacent affective surfaces and the main floor bathroom. The result of the repair shall provide for a reasonably smooth level floor. This work is due to poor workmanship.
2. LAUNDRY ROOM DOOR: The Builder to repair and/or replace this door. This repair is due to poor workmanship. The repairs shall reasonably match the existing.

The complaints of basement floor cracks, driveway sinking and landscaping rough, dishwasher hook-up exposed under cupboards, fireplace gas line exposed and floor beams of weak construction were all rejected by the New Home Warranty Program as being unwarranted.

In reply to the Conciliation Inspection report, Ray Bouma informed the New Home Warranty Plan on September 6, 1989 that the supply and installation of the ceramic tile floor was contracted for and paid for by the owners; and the New Home Warranty Program then removed the first item from the Schedule "A(1)"; and put it on Schedule "A(2)".

A re-inspection of the house was done by Gary Snively and Ken Rose on January 23, 1990. They found that both matters of the uneven foyer floor and the basement floor cracks should remain as Schedule "A(2)" items for the following reasons:

Item #1: Basement floor cracking beyond (superficial) remains an "A(2)" item. Shrinkage of materials caused by drying after construction is excluded by Section 13(2)(d) of the Act.

Item #6: Floor in foyer uneven (sunk) remains an "A(2)" item. Shrinkage and twisting of materials caused by drying after construction is excluded by Section 13(2)(d) of the Act.

That letter of January 29, 1990 led to an appeal to this Tribunal after a formal decision letter of May 3, 1990.

Mr. Enio P. Sullo, P. Eng. was the first witness called on behalf of the owners. His incorporated company does investigative work and he stated that he had more than 400 inspections completed over the past ten years. He visited the Paterack home on February 26, 1990 and twice thereafter and made the following observations:

Based on our inspection, it is evident that the concrete basement floor has cracked at a number of locations. While it is not unusual for basement floors to crack, the extent of cracking in this case appears to

be excessive. There are a number of possible reasons for the cracking, including an improperly consolidated base or workmanship problems at the time of placement of the concrete. In our opinion, while the cracked basement floor is unsightly, the defect does not affect the intended use of the floor. A simple method of "correcting" the defect would be to install a floor covering (carpeting etc.)

With regard to the alleged deflection of the front lobby of the house, we did note that the deflection was noticeable both on the main floor and within the basement area. Our close inspection revealed that the reason for the deflection is an improperly placed joist in the floor framing. Floor joists are normally cambered (bowed upwards) to allow for normal downward deflection during use. In this case, a single floor joist was placed upside down with the camber pointing downwards. The problem was further compounded by the existence of a large camber on this particular floor joist. At this time, the repair of the deflection is very complex since all floor (including a ceramic floor), wall and ceiling finishes are in place. All these finishes have been installed to match the deflected configuration. The basic repair procedure would be to extract the incorrectly installed floor joist, raise the floor and replace the joist accordingly while at the same time restoring all finishes. We are of the opinion that this work is required not only to eliminate the unsightly deflection of the lobby floor but also to restore the full structural integrity of the floor framing.

Photographs were taken by Mr. Sullo and entered as Exhibits, and they show the joist in question, as well as the foyer area and basement cracks. A deflection is shown as an increasing gap under the foyer closet doors.

Mr. Sullo reviewed a Proposal of April 10, 1991 by Duo Building Ltd. which proposed substantial renovations and repair work to remove stud walls on the first and second floors, put in a new floor joist and correct any adjustments to the whole house which may result, including removing and replacing all ceramic tile in the main floor and in the second floor bathroom. This was to be done at a cost of \$20,336.00 plus taxes.

Mr. Sullo stated that all joists have a bow or camber which causes a rise in the centre and which becomes horizontal as a load is placed on the joist. In his view, the problem was not caused by the natural shrinkage of material.

On cross-examination, Mr. Sullo stated that he had personally framed some 24 homes and had a construction business in the Chatham area in earlier years. He observed that the foyer slope problem is less than one inch to the low point and that there are no cracks in any tiles or grouting. With one joist bowed done and the others all bowed up properly, Sullo saw the average of the differences to be about $3/4$ ". The joists are otherwise all properly sized and blocked, in his opinion. There is no evidence of any movement after construction nor of any structural weakness in the floor, but Sullo thought that the maximum load may not as yet have been placed on the foyer. Sullo saw no gap from the subfloor to the joist in question and did not take any level measurements in the second floor bathroom or in the powder room. He noted that no cracks appear in any of the main floor or second floor walls or ceilings, and that the powder room wall above the joint in question does not appear to be a load bearing wall.

Sullo noted that the house was two years old at the time of his inspection, and stated that the fact of the floor joist in question being between two heating ducts would have little effect on the rate of drying for that joist compared with the others. Since any problem may be carried up to the second floor if repairs are done, Sullo believes that all the work possibly required in the Duo estimate should be the responsibility of the New Home Warranty Program to complete.

Zoltan Balogh has had some 13 years experience as a renovation contractor. On his visit to the Paterack house in March 1991, he used a six-foot level to measure the various floor deflections and found from $3/4$ " to 1" in the foyer, powder room and second floor bathroom. While the bathtub was level, he noted on the length of the of the surround wall above the bathtub, a slope along its edge of some $3/4$ ". In his view, the joist in question is likely under the powder room wall so that any repairs would move through the walls and cause cracks and other problems. While some of the work in the estimate may prove not to be required, the full

total may well be needed in his view. He also believes that the joist in question was put in upside down and that it needs to be cut and then bridged.

On cross-examination, Balogh confirmed a deflection of the joist as seen in the basement to be about 1" across a line joining the others and that there were no cracks in the grouting or tiles in the foyer, or anywhere else in walls or ceilings. He agreed that the foyer floor could be levelled if the tile and mesh were removed as long as the extra weight of the levelling material would not be too heavy a load on the 5' by 3' area affected. The whole tiled area would have to be redone due to the usual problem of matching dye lots after several years.

Stan Paterack is a retired car dealer from Leamington who was looking forward with his wife Anne to moving into their first new home. The house was framed with roof and subfloors in when they saw it, and on moving in October 1988, there were a few problems. The unevenness of the ceramic foyer floor was noticed in the first month; and this was also felt in the foyer closet and powder room as well as in the second floor bathroom. In response to Bouma's letter which noted that Paterack had hired Linca Flooring so that the builder was not responsible, Paterack had Jeff Vanderlinden, the President of that limited company visit. Paterack stated that Vanderlinden went to the basement, saw the joist and said that the problem was that of Bouma's responsibility. From the Schedule "A(1)" at the conciliation inspection, Paterack noted that the laundry room door had been repaired.

For the second conciliation, Paterack stated that Ken Rose did not remove his coat but in a brief ten minute visit saw the floor joist in the basement and took no measurements as to the level problem. Since two builder friends told him that the joist must be upside down, Paterack then called in Sullo for a report. The New Home Warranty Program did not respond after the Sullo report was sent in.

On cross-examination, Paterack stated that the only extras for the house were for basement dry wall done by a subtradesmen and for the whirlpool tub for which Bouma was paid \$2,000. An allowance of \$150 was given by Bouma to Paterack for upgrading of the foyer tile, and Linca Tile was recommended as a good installer. Linca Tile did measuring and installing; and \$2,800 was paid to Linca Tile directly by Paterack several weeks after closing. Paterack agreed that there was no movement in the tile floor or any cracks in either tiles or grouting.

The first witness for the New Home Warranty Program was Ray Bouma, President of the builder corporation. A builder since

1964, Bouma constructed sixteen homes in the Paterack's subdivision. The Paterack home was built in the summer of 1988 and his own crew did the framing. This is a two storey, four bedroom home of some 2,300 square feet in area. An allowance was given of \$5,200 for all floor coverings, and this was used up in carpet and linoleum choices by Mr. and Mrs. Paterack. Linca Flooring was not the provider or installer of those materials in this home, but was recommended by Bouma to Paterack since that company does very good ceramic tile installing.

The tile work was done before closing and was laid on 5/8" tongue and groove spruce plywood laminated and nailed to the floor joists. Bouma stated that he had no direct contact with Linca Flooring during this installation. When Paterack pointed out the depression in the finished foyer, Bouma agreed that a 3/8" deflection does exist. He does not agree that the joist in question was installed with any bow or camber down. In his view, the joist was likely straight and wet when installed and has dried naturally into this position.

When asked what he would do if this was his own home, Bouma stated that these suggested repairs would only damage the floors and walls of the house. Bouma would strengthen the floor, and then lift and replace some tiles after levelling the foyer with added grout.

On cross-examination, Bouma claimed that his experienced framing crew would not install a joist with a bow upside down and that this joist was likely a straight one which had deflected downwards later. He stated that the problem was partly the fault of Linca Flooring in that their workman should have noticed any floor deflection before the tile flooring was laid. Either the floor should have been levelled from beneath with joist adjustment by Bouma, or more grout should have been used by the installers when they levelled the floor.

Mike Van Den Sluis is the Vice-President of the builder corporation and has had ten years of construction experience. He is a qualified carpenter and was at the conciliation inspection. In his observation, he stated that the foyer and other floors are not level with a 3/8" to a 1/2" deflection. He was in charge of the framing crew at the time that three other houses were also under construction and can agree to a 1/2" deflection on the subflooring for the Paterack home. He said that some 40% of floor joists are straight lumber with no observable bow or camber. On any movement of 1 1/2", he noted that an average of 1/2" is, therefore, reasonable. He would take up the foyer tile, and level the area and then relay the tiles. He would do no further work other than to reinforce the joist in question.

Jeff Vanderlinden is the President of Linca Flooring in Chatham. In seven years, he has built a business with more than 20 employees and installs all types of floor coverings in new homes and commercial building. He dealt with Mr. and Mrs. Paterack and measured the site, while the ceramic flooring tiles they purchased were installed by a crew in three days.

He expects a floor tolerance of from $3/8$ " to $1/2$ " and does regularly a filling in with grout for levelling. In his view, even a 1" deflection is not too much to fill and the weight of materials is not of consequence. His account was promptly paid and when he visited the home at Mr. Paterack's request, he was shown the deflected area. The tiles are all well laid with no cracks, but he agreed that the fault was somewhat the responsibility of his installer. He would remove, level and replace the foyer tile. He had ordered three boxes of exactly matching tile and has them on hand so that the suggestion that the whole tile floor has to be replaced due to mismatch problems is not the case in this situation.

In his evidence, he stated that levelling will successfully resolve the foyer floor problem and that the other floors are within tolerable allowances.

On cross-examination, he agreed that his workers should have seen the problem, but that the pillowed edges of the tile would mask what would be more obvious with square joints of flat tile. He finds a $3/8$ " deflection acceptable and is prepared to do the necessary work and supply the exactly matching tile for the repairs.

Gary Snively is the conciliator who was responsible for this claim. He measured an average $3/8$ " deflection on the floor using a level. While the depression in the foyer floor was not acceptable at the time of the conciliation, that decision was reversed when the direct contract with the flooring installer was discovered. In his view, the construction of the house does conform to the Ontario Building Code, and the joist has changed position, perhaps due to influence of the heating ducts being on either side. He agreed that the installing of the foyer tiles would be a workmanship issue, since there are no cracks in the tile or the grout, nor any other damages to the house.

Snively does not accept the Sullo opinion of a joist being installed upside down and has not seen such an event in his experience. He sees no consequential damage to the house and finds the Duo estimate to be unreasonable. He agreed that if a joist was clearly upside down, repairs would be required and any

consequential damages and repairs would have to be attended to by a builder since the item would then have been on the "A(1)" Schedule.

In argument, counsel for the homeowner stated that the sole cause of any problems is the one floor joist. He sees the purpose of this hearing as to decide the cause of the problem and of if warranted, to decide what is to be done. He relies on the Sullo report that the joist was installed upside down as the reasonable explanation for the problem. Since the tile floor was put in during October 1988 and the framing was five weeks earlier, he rejects the idea that any shrinkage could be due to heating in the house. Since there are no cracks in the tile or grout, he believes that deflection took place if at all before the tile was laid.

In his opinion, the remedy is not to just take up and relay tiles. He sees the need to replace the joist and to take care of any consequential damages which may then occur.

The question of tolerances was also addressed. Counsel reminded the Tribunal that workmanlike issues are important in appearance matters even if in this case the foyer tile floor appears sound; and the decision in Bohan was cited (1987, 16 CRAT 138).

In reply, counsel for the New Home Warranty Program agreed that one joist is off and was so prior to the ceramic tiles being installed; so that the tile installer could and should have fixed the problem with extra grout or have the builder put in a new joist then. Since the joists are not manufactured with a camber or bow but have one naturally, he sees the difference in level of 1/2 to 5/8 of an inch as tolerable and notes that no movement of the floor has since taken place. He notes that there is no evidence of any gap or separation in the area between the joint and the subfloor and indeed the subfloor could not have been installed if the joist was upside down. Since the owners did directly contract with and pay the tile installer, the matter is excluded from any duty of the New Home Warranty Program to repair as the deflected foyer floor is the tile installer's problem to fix. The other floors are within tolerable variances and excessive repairs as suggested could cause far worse problems than the present minor ones. The tile installer has agreed to repair and relay the foyer floor with exactly matching tiles and now, more than two and one-half years later, that is all that needs to be done in his view.

After considering the evidence, the Tribunal agrees that the matter of the basement cracks is unwarranted. On the evidence in the Sullo report, "the defect does not affect the intended use of the floor".

The matter of the floor joist is more difficult. On the one hand, repairs to the foyer are offered by the tile installer Linca Flooring at a self-absorbed cost of perhaps \$250 and three boxes of exactly matching tile. On the other hand, a proposal to replace the joist and cover any consequential damages to a possible cost of more than \$23,000 is suggested.

The Tribunal finds that the joist in question is not necessarily installed upside down. As wood is a natural product, it is more likely that the experienced framing crew put in a straight joist which has since deflected down.

In order to give the homeowner a reasonable settlement of his claim, the Tribunal by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act directs:

- a) that the New Home Warranty Program arrange for a second joist to be screwed on to the joist in question with any necessary bridging in order to alleviate any possible future structural uncertainties;
- b) that to ensure a good and workmanlike completion of the foyer in the house, the New Home Warranty Program then ensure that the floor tile be removed and the area levelled with replacing matching tiles then laid, since the original floor joist caused the problem even though the tile installer might have discovered and remedied the situation; and
- c) that any subsequent necessary trim, paint and closet door adjustments be then completed in the foyer area.

LINDA AND LEO PINIZZOTTO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:
LINDA PINIZZOTTO, appearing on her own behalf
and on behalf of Leo Pinizzotto

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 April 1991 Toronto

REASONS FOR DECISION AND ORDER

This is a claim by the owners Linda and Leo Pinizzotto against the Ontario New Home Warranty Program with respect to the installation of ceramic tiles in a basement foyer of their home for which they had paid \$3,400 as an extra. The purchasers took possession on September 15, 1989 and filed a complaint with the Program on November 5, 1989. In that letter, there was a complaint with respect to 21 items. Subsequent indications were that in total, there were 23 items - all of which were either corrected by the builder, abandoned by the homeowner or determined not to be warranted with the exception of the one item dealing with the ceramic floor installation in the basement foyer.

In the original letter of complaint, the homeowner stated:

...All tiles are totally uneven. I believe the tiles were laid directly on the basement concrete floor without any subfloor to ensure a proper level. Since basement floors can be extremely uneven - the result definately(sic) unsatisfactory.

The attachment to this letter, Number 19 referred to:

Basement foyer - ceramics totally uneven
all tiles

Subsequently, the owner wrote to the Program by letter dated January 23, 1990, in which the owner stated:

During our conversation, Vince suggested that there could be a possibility of someone having walked on the tiles originally before they were set. He was the installer and confirmed that the floor was laid evenly. This would definatley (sic) explain the extent of the unevenness.

In her evidence before the Tribunal, Mrs. Pinizzotto indicated that subsequent to taking possession on September 15, 1989, she noticed that the tiles were uneven in height "as if someone had walked on them".

It, therefore, appears that there were two issues raised by the homeowner with respect to the installation of the ceramic tile in the basement foyer; the irregularity and unevenness in height; the basement foyer was not a level floor over its entire surface. As a result of the homeowner's complaint, a conciliation inspection occurred on February 20, 1990 and the Program issued a decision letter under date of February 22, 1990. In that letter the Program stated as follows:

The tile in the basement covers the entire foyer. I found the grouting between the tile to be straight and consistent in width. A level was used to determine the difference in heights from tile to tile. This difference varied from a maximum of 1/16 of an inch in some tiles, to others being flush with each other. It is my opinion that these variances are not excessive, and are acceptable to the Program. The two tiles which have been removed are warrantable, which your builder is willing to reinstall.

On March 12, 1990, the homeowner again complained to the Program and listed outstanding deficiencies, number one of which was the basement ceramics foyer. This complaint stated:

totally uneven (approx 75%) of all tiles
all corners (upgraded feature - \$3,400
extra paid) improper workmanship - no
levelling of floor

As a result, a further inspection occurred on April 3, 1990 and the Program responded by letter dated April 4, 1990. In that letter the Program stated as follows:

As per our telephone conversation, your builder is still willing to address item #1, which is the uneven tile in the basement foyer. It is still the decision of the Warranty Program that this tile area is acceptable, however; your builder still wishes to address this defect.

In all of its correspondence with the homeowner, the Program addressed the issue of unevenness of tile installation, but did not specifically address the issue initially raised by the homeowner concerning the sloping of the floor in the basement foyer. The issues which appeared to have paramountcy were the unevenness in height of the tiles and subsequently when several tiles were removed, the question of colour in replacement tiles. Had the Program addressed the matter specifically of the sloping of the floor, including the nature of basement floors and the requirements under the Building Code that basement floors slope to drains, the matter might very well have been resolved without the necessity of its coming before this Tribunal.

It is the view of the Tribunal that the Program has an obligation clearly to determine what is the nature of the complaint of a homeowner and squarely address the issue, indicating whether in fact the matter is, as contended by the Program, in compliance with the Building Code or the discrepancy of which the homeowner complains is within acceptable limits which was also contended by the Program.

All witnesses before the Tribunal indicated that, in fact, the basement foyer did have a slight slope. Both Mrs. Pinizzotto and her witness indicated that this was unacceptable, that everyone understood that a basement floor slab might be uneven and that it was incumbent upon the builder and its tile setter to do whatever was necessary to level the basement foyer before installing the tiles.

From the builder's evidence and particularly that of its tile setter, the response was that the tiles were properly installed, that there was a slight slope but within acceptable variance and from the Program's point of view, there was stated that there must be a slope to the drain in the basement in accordance with the Building Code. From the photographic evidence which was presented to the Tribunal, it was difficult to assess

whether the slope was of such a degree as to be unacceptable. In addition, the Tribunal was informed by all parties that Rockford Tile Contractors Limited, the installer, had installed ceramic tile throughout this home, that the same crew which laid the ceramic tile in the basement foyer had also installed the tile in the rest of the house and, acknowledged by Mrs. Pinizzotto, was that the tile installed in the rest of the house was quite acceptable and there was no complaint in that regard.

Under the circumstances, therefore, the Tribunal finds that the lack of level flooring of which the homeowner complains with respect to the basement foyer ceramic tile is not beyond acceptable installation.

With regard to the unevenness of the tile. Evidence was presented to the Tribunal that in total six tiles had been removed from the floor and as they were cracked in the process of removal, six replacement tiles have been made available, but have not been permanently installed. The photographs presented in evidence did indicate a slight variation in colour and the evidence given before the Tribunal indicated that it would be impossible completely to match the balance of the tiles installed, both from the point of view of tile lots and the question of age causing a slight colour variation. The Program has, however, determined that these tiles and their installation was warranted. But there is obviously some concern as to whether a match satisfactory to the homeowner can be achieved in the installation. It seems that throughout the process the Program was addressing the issue of tile replacement and height unevenness, and the homeowner was addressing that plus a level floor. Because of this failure of clear communication for which the Tribunal holds the Program responsible, it is the view of this Tribunal that the homeowner should be given the following option:

1. The six tiles which are loose or six other tiles which the owner and the contractor find mutually acceptable are to be installed by the contractor or builder, but any variation in colour must be accepted by the homeowner as being a satisfactory match.

2. In the alternative, the homeowner may elect to receive a cash compensation of \$1,000 and assume full responsibility for completing the repairs to the tiles.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to replace the tiles in accordance with the foregoing or to compensate the homeowner by payment of the sum of \$1,000, at the option of the homeowner.

MR. AND MRS. JOSE RAPOSO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN HURLBURT, Member

APPEARANCES:
JOSE RAPOSO, appearing on their behalf
STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 24 April 1991 Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Jose Raposo purchased a new home at 11 Teingmouth Avenue in the City of York and took possession in March of 1989.

The Offer to Purchase entered into by them with GT Investments Corporation reflects the commitment by the builder to provide all gas heating in the premises. Upon taking possession, however, they found the furnace to be electric and not gas. This is the only issue between the parties and the appeal to this Tribunal is based on the failure of the builder to provide the gas furnace pursuant to Item 3 on the Schedule attached to the Offer to Purchase.

Mr. Raposo in his evidence points out that prior to the closing, he objected to the builder about the electric furnace and was assured by Mr. Angelo Quattrociochi, the builder, that the furnace would be changed and a gas furnace installed. This evidence is to some degree supported by a letter written by Raposo's solicitor to the solicitor for the vendor complaining about the furnace. This letter was not produced in evidence but referred to in correspondence to Raposo by Mr. Rossman, the solicitor for Raposo, in which Mr. Rossman states the following:

February 13, 1990

Mr. and Mrs. Jose Raposo
11 Teignmouth Avenue
Toronto, Ontario

Dear Mr. & Mrs. Raposo:

RE: RAPOSO P/F Q.T. INVESTMENTS
 OF 11 TEIGNMOUTH AVENUE
 TORONTO, ONTARIO

I wrote the attached letter to the vendor's solicitor.

The undertaking received on closing provided for the completion of gas lines and finishing the house in accordance with the agreement of purchase and sale. This includes "gas heating" item #3 of the schedule to this agreement of purchase and sale.

I also contacted the Hudac office and advised them of your problem. The Toronto manager replied: That they did not receive a reply from the builder with respect to your October 19, 1989 letter.

I am secindg (sic) to the Hudac manager Mr. Perryman a copy of the undertaking and agreement of purchase and sale. He will review this with the builder.

Yours very truly

AUBREY M. ROSSMAN
AMR:dr
Encl.

It appears from this correspondence that Mr. Rossman received an undertaking from the builder/solicitor on closing that the premises would eventually be changed to gas heating. It also

appears that Mr. Rossman intended to send to the Program a copy of this undertaking. Unfortunately, neither the undertaking nor a copy of Mr. Rossman's letter has been put in evidence despite the fact they could have had a bearing on this Tribunal's decision. Mr. Raposo took possession in March of 1989, but his first complaint to the Program concerning the furnace was in May of 1990 during a conciliation meeting. Since the issue was not brought to the attention of the Program in writing during the first year pursuant to Section 22 of the Regulation 726, Mr. Raposo's claim would have had to be denied. The letter and undertaking provided to the Program by Raposo's solicitor, however, may have been made within the year (in February, 1990) if it were sent, but the evidence on behalf of the Program is that there is no record of its receiving them. Since, however, this issue has not seriously been raised by the Program in its defence, we are inclined to give the benefit of any doubt in the matter to the appellant and find that notice was directed to the Program within the limitation period by the solicitor concerned.

It is argued on behalf of the Program that the substituted furnace was equal in value to the gas furnace agreed to in the contract, and since it was not an item to be selected by the owner, the vendor was entitled to make the substitution pursuant to Section 20, subsection 3 of Regulation 726. The builder in his evidence observed that the cost was about equal since he was required to install a new 200 amp service to accommodate the electric furnace. Mr. Raposo, however, in his complaint to the Program attached to the claim for substitution, points out that he received an electric furnace valued at \$1100.00 whereas it was now estimated to cost \$2300.00 to install a gas furnace.

The evidence, however, does not support the claim for that difference. Exhibit A, tendered on behalf of the Program, indicates the gas furnace can be purchased and installed at a cost of \$1500.00 - \$2,000.00 whereas the cost of an electric unit is between \$1,000.00 - \$1,500.00. With the extra cost of the 200 amp installation, the cost is relatively the same.

Mr. Robert Rosset, giving evidence as a conciliator for the Program, tendered in evidence a document from the Ministry of Energy, Exhibit 6, A and B, which indicated the cost of electric heat to be somewhat higher than that provided by gas but this is only a generalization. Mr. Perryman, the Regional Manager for the Program, said he was advised by a heating contractor that the cost in this particular house would be just about equal. It was his opinion that the substitution in all respects came within the substitution provisions of Regulation 726.

This is a matter in which the evidence adduced by the appellant is most unsatisfactory in that we are left to draw conclusions on approximate and unproven values and estimates. Exhibit 6A, on behalf of the Program, gives us really the only indication of the comparable values of gas and electric furnaces. The document provided by the Ministry of Energy shows a gas furnace in the highest to lowest range to cost \$500.00 more than an electric furnace. We considered this to be the amount of the deficiency in the substitution which the appellant has complained of and there will, therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Act, be an order directing the Ontario New Home Warranty Program to pay to the appellant the sum of \$500.00 in full satisfaction of his claim.

R. AND S. RATNASABAPATHY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN CORSI, Member

APPEARANCES:

R. AND S. RATNASABAPATHY, appearing on their own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 April 1991

Kingston

REASONS FOR DECISION AND ORDER

Mr. Rasiah and Mrs. Sathiyabama Ratnasabapathy bought their new home at 23 Collegeview Crescent in Kingston on July 15, 1985 from Dacon Corporation Limited.

On May 23, 1989, they entered a claim for two major structural defects pursuant to Section 14 of the Ontario New Home Warranties Plan Act as follows:

1. The fire place has major structural defect and it is leaking every time it rains from the date of possession. Dacon Corporation Ltd. had tried to repair some on six occasions from year one, but with no success yet. The wall is always damp and the building could collapse if the situation is allowed to continue.
2. There is a very major defect (structural design) in the house in that we cannot take any standard queen size bed to the bedrooms because of inadequate height at the stair case. This major design defect in construction has caused great hardship and lowered the value of the property.

The damage is \$40,000 in monetary terms.
We shall be grateful if you will be so good
as to look into this and grant us relief.

A Proof of Claim was formally submitted on November 20, 1989 repeating the two claims.

Mr. Rasiah Ratnasabapathy appeared before the Tribunal to give evidence as to his claims. He graciously agreed that he could be referred to as Mr. "Ratna" and this decision will do so.

Concerning the fireplace, Ratna claimed that the component materials were not properly installed; and that the builder returned three times to repair the flashing and did caulking to block any water leakage into the chimney.

No leakage was complained of into the attic of the house, nor was any water damage apparently done to the interior walls or ceilings. Any other complaints about the house were promptly repaired by the builder. There was no complaint of this problem made to the Program within one year of possession because the builder was attempting to remedy the problem.

In five years, Ratna has never used the fireplace and showed photographs to the Tribunal which showed heavy streaks of rust down the inside of the firebox caused by the trickling of water. The chimney has a protective cap so that the water has apparently come through the bricks or from a leakage of roof water.

From photographs, the chimney shows some efflorescence, but no apparent structural damage or cracking. There is seen to be caulking on both sides where the chimney meets the aluminum siding of the house.

The complaint about the staircase is that the clearance height is not enough to allow for the easy moving of usual bedroom furniture to the four bedrooms on the second floor of the house.

Ratna had not taken any precise measurements, and described the staircase as having two treads, then three winders to the left and six or seven further treads. The width from wall to bannister is satisfactory. In his view, the staircase should be a straight one with the end wall at the main floor removed so entry would be from the living room. Estimates were obtained this month by Ratna to re-angle the stairs and attend to the chimney problem at costs of \$6,955 and \$4,500; and a new fireplace insert had prices quoted in the \$1,400 to \$1,600 range.

Ratna agreed that there was no discussion of these possible expenditures with the builder in earlier years, and that the inspection for these defects took place on January 26, 1990 with a representative of the builder being present.

In cross-examination, Ratna noted that the problem with the chimney first was seen in the Fall of 1985; and that the letter of May 23, 1989 was the first notice sent to the Program. He said that the house has an electric furnace and that the family room where the fireplace is located is in daily use. While the staircase may well conform to the Ontario Building Code requirements, Ratna is of the view that more is needed to resolve his concerns about the stairs. The damages claimed of \$40,000 reflect Ratna's expected repair costs, his loss of living room space if the stairs are rebuilt and a claim for emotional suffering.

Kevin Rector has been a conciliator with the New Home Warranty Program for three years, and conducted the inspection on January 26, 1990. Since the claims had not been advanced within one year of possession, the Program considered these two items under the category of possible major structural defects, pursuant to Sections 13(1)(b) and pursuant to 14(1)(c) of the Act.

By Section 13(1)(b), every vendor of a home warrants to the owner (b) that the home is free of major structural defects as defined by the Regulations.

That definition is in Ontario Regulation 726 as follows:

"major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship of materials;

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure

and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Rector stated that he had made full measurements of all of the aspects of this staircase in a standard four-bedroom house, and found the stairs to be structurally sound with no workmanship or materials problems and no safety concerns for pedestrians.

On a re-inspection, he noted the average rise to be 190 mm where the Ontario Building Code allows 200 mm. The tread, the tread width, the nosing projection and the staircase width are all within Code limits. The head room on moving up the stairs is 2.05 metres which is 10 mm more than required. The three winder steps make a proper 90 degree angle and there is a continuous handrail of standard allowed height.

Therefore the stairs, in his opinion, fully comply with the Ontario Building Code. Furniture is in the four upstairs bedrooms and there is no major structural defect with the staircase as it is, in either part of the quoted definition.

On cross-examination by Ratna, Rector stated that he saw no cracks in the chimney from ground level viewing and that he had not used a ladder to climb up and inspect the top of the chimney or the roof flashing.

Again he saw no major structural defect as defined in the fireplace situation. In his view, the family room is acknowledged by Ratna to be in constant use and there is no reason for Ratna not to use the fireplace as intended. Indeed, the fireplace concern may well be lessened by routine usage.

In closing argument, counsel for the Program reminded the Tribunal that for Ratna to succeed in his claim he must bring himself clearly within the definition of major structural defect.

He reviewed the line of cases which has required strict reliance on the definition in order for the Applicant to succeed and would demand that a "house was in danger virtually of falling down or was totally unfit to be used as a residence".

Deichsel (1986) 15 CRAT 125
 Doshi (1986) 15 CRAT 127
 Earley (1986) 15 CRAT 134
 Kennedy (1982) 11 CRAT 110

A differing view was advanced in another basement crack situation where the Tribunal saw some unfairness in following the "whole house" line, and found that where a part of the house may be unusable, the Applicant could succeed.

Gonzalez (1986) 15 CRAT 144

In between these two views, another panel of this Tribunal found "a via media reflecting both a reasonable interpretation of the Act and justice for the Applicant". A basement crack claim was allowed since the completion of a finished basement was seen as an "integral and necessary part of the house".

Ferguson (1987) 16 CRAT 149

Counsel stated that the claims before the Tribunal do not bring Ratna within any cited decision. There is no defect of workmanship or materials and even if there was, there is no resultant failure or adverse effect.

The staircase is designed and built in accordance with all the detailed requirements of the Ontario Building Code. The family room is in constant use, and the fireplace is not used solely by Ratna's choice.

On the evidence presented, the Tribunal finds that in neither of Ratna's claims has there been a failure in any load-bearing portion of the building, nor has its load-bearing function been materially or adversely affected. Further, there is no evidence that there is any defect in workmanship or materials which materially and adversely affects the use of this house for the purpose for which it is intended.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims.

R. WAYNE RICHARDSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
LUCIENNE BUSHNELL, Member
WILLIAM WATSON, Member

APPEARANCES:

R. WAYNE RICHARDSON, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 26 August 1991

Ottawa

REASONS FOR DECISION AND ORDER

R. Wayne Richardson ("Richardson") agreed to purchase the property at 10 Binnington Street in Nepean from Regional Builders (Nepean) Inc. in an agreement dated April 19, 1988, which was accepted by the builder the next day. The purchase price was \$245,100 and the house was to be completed with the closing of the transaction to be August 25, 1988.

Richardson had an inspection done of the property on August 24 before closing and there were many outstanding matters to be completed. Closing was delayed to August 30 to allow for many of the items to be resolved.

On September 23, an eight-page letter of incomplete items was sent to the Ottawa office of the New Home Warranty Program, together with a copy of Richardson's Home Inspection Report. On February 13, 1989, Richardson sent in to the Program a six-month report with 22 pages of items. On August 28, 1989, he sent in a "Year-End" Report of 13 pages with certain added items and noted that he had never had an inspection of the exterior of the home with the builder in the first year of occupancy. Attached to that letter was a Year-End Warranty Inspection Report from Home Inspectors, with 28 further observations.

A conciliation was requested on August 29, 1990, and on October 22, 1990, Daniel Moreau inspected the home with both Richardson and Merv Clarke who was the builder's representative.

Nine items were entered on Schedule "A(1)" and 12 items on Schedule "A(2)".

Four of the items not allowed on Schedule "A(2)", together with a complaint concerning a replaced bathroom counter-top, are the items before the Tribunal today. The decision letter from the Program of January 4, 1991, forms the basis of this appeal.

Richardson presented his own evidence while the New Home Warranty Plan presented the following four witnesses:

- Dan Moreau ("Moreau") is a technical representative and conciliator with the Ottawa office of the New Home Warranty Program. He has had five years' experience in conciliations and is a graduate Civil Engineer;
- Sam Guzzo ("Guzzo") is the Sales Manager and former job scheduling person who has been with Astro Flooring for ten years, which company has done the floor work for Regional Builders for more than four years;
- Bill Mayhew ("Mayhew") is the Assistant Regional Manager of the Ottawa Office of the New Home Warranty Program. He has been with the Program for some 13 years and was a Construction Superintendent before. He is a certified Civil Engineering Technologist.
- Merv Clarke ("Clarke") is the Vice-President and co-owner of Regional Builders (Nepean) Inc. As a neighbour of Richardson, he undertook to ensure that Richardson would have his various concerns remedied and was at the home on some 20 - 30 separate occasions.

Scratches on the Outside of Certain Windows:

The complaint in Schedule "A(2)" notes

- 9. Complaint: Powder Room Mirror Scratched
- 10. Complaint: Windows Scratched

Explanation: As to items #9 and #10 above, the scratches on the mirror and various windows are minor, and are not noted on any preoccupancy documents. These items of damage are therefore considered to be caused by forces unknown and not covered by this warranty.

The decision letter states:

In reference to #1, window scratches:

Minor scratches were visible on the windows in question, however, the scratches were pronounced on the window in the front left bedroom.

A deficiency list, dated September 23, 1988, noted the scratched windows. However, on the three previous deficiency lists, engineer's report (dated August 24th and August 31st, 1988) and the inspection list carried on between the owner and builder (on August 24th and updated and signed, September 9th, 1988) there was no mention of the scratched windows.

Therefore, since the damage was not noted at the time of occupancy, nor on the September 9th updated list, which was 9 days after occupancy, the Program must take the position that damage may have occurred after occupancy. The Program does not cover items of damage, unless it is noted at the time of occupancy, and hence, responsibility can be placed on the builder.

Richardson said that many paper tabs had been placed throughout the inside of the home at the time of closing inspections; and that his concern for outside items was not then great as there was no inspection done of them. The Certificate of Completion and Possession of August 30, 1988 notes: "exterior to be completed" which Richardson claims protects his assertion that the scratches on the windows were likely done by the builder's team that did a final cleaning of the home before closing. As Richardson had lived in an apartment for nine years and only

acquired a ladder in September, 1989, he believes that certainly the more pronounced scratches on the window glass in the front-left bedroom should be a warranted item.

The photograph submitted by the New Home Warranty Program clearly shows four or five scratches of some six-ten inches in length. Richardson's photos of the other windows show where masking tape marks certain scratches which themselves cannot be readily seen on the photograph.

Moreau agreed that the only scratches readily seen were those in the front-left bedroom while others were very minor and almost inconspicuous. He did not see these scratches as defects either in workmanship or materials, and notes they were not referred to in the Certificate of Completion and Possession so that they may well have occurred after August 30, 1988. Mayhew repeated Moreau's opinions based on his own personal visit. Clarke saw the scratches, but to him most were minor and were not done by any of his employed cleaners to his knowledge. The windows had been cleaned on August 25, 1988, two days after the date on the painter's invoice so that any scratches resulting from cleaning should be perhaps around the perimeter of the glass panes, said Clarke. Since there are no such scratches Clarke is unable to explain the other longer scratches.

Counsel for the Program suggested that the failure to report any scratches in the Certificate of Completion and Possession should relieve the builder and the Program of any responsibility.

The Tribunal finds that the clearly observable scratches on the center pane of the front-left bedroom window make that window a warranted item in that there is a defect in material. We find that the scratches on the other windows are minor and will not warrant them. We, therefore, direct the New Home Warranty Program to replace the center pane only of the window in the front-left bedroom.

Hardwood Floor:

The complaints in Schedule "A(2)" notes:

7. Complaint: Floor Boards Splitting Apart, and
Hardwood Requires Refinishing

Explanation: Overall, no defect in materials or
workmanship could be observed with
respect to the hardwood flooring, its
installation, or its finishing. The

homeowner's report of poorly finished areas, or the existence of foot prints in the varnish, could not be confirmed. Minor scratches were noted at the northwest corner of the living room which are consistent with normal wear and tear.

In addition, there is an area of severely warped hardwood in the bay window of the livingroom. This damage is consistent with what can occur from excessive moisture accumulation in this area. This item was not noted on the preoccupancy documents, and therefore is not warranted, as it is damage caused by forces unknown.

The decision letter states:

In reference to #2, damaged oak flooring in the living room:

The oak flooring at the right side of the living room bay window has cupped. The cupping has all the indications of water damage.

The first mention of the damaged floor in this area was in a deficiency list, dated February 13, 1989.

In the extensive list prepared on September 23, 1988, the only mention of any damage in this area was a burn mark which had been sanded out but the area had not been varathaned.

Therefore, since there is no documentation at the time of possession, the Program must take the position that the damage occurred after occupancy. The Program, as previously mentioned, does not cover items of damage unless it is noted at the time of occupancy.

The hardwood flooring in this house runs through the livingroom, the diningroom and the foyer. Richardson gave his opinion that the cause of his problems began when a heavy rain on August 24, 1988, soaked the floors when the double-hung windows on the sides of the bay had been left open during the final urethane finishing of the floors.

"Bubbling" on the surface, a possible footprint mark and some rough finish were complained of and the splitting apart of the joints was included in Richardson's report of February 13, 1989. These floors were resanded and refinished on August 2-4, 1989.

Moreau saw no defects in workmanship or material for the floors and observed only minor joint splitting which is not unusual. His photographs show an area of some warping at the right bay window area likely caused, in his opinion, by water after possession since the reference is in Richardson's six-month report. Moreau believes that moisture from August 24, 1988, would have promptly shown an effect within a month. He agreed that no water stains were apparent on the wall below the window.

Guzzo gave the opinion, from his experience, that water must have been on the surface to cause the hardwood floor to warp and have blackness in the joints.

He repeated the view that damage would show up in from two - four weeks and would have been evident in September, 1988, if caused from the events of August 24 referred to by Richardson.

He said that any damage since would have been attended to in the work of August 2-4, 1989. Since moisture will come out of wood within a year as adapting to climate occurs, no further movement is then expected. If the problems were seen in October, 1990, then he believes that water must have been on the flooring after August, 1989.

Mayhew stated that he saw no defect in workmanship or material in the hardwood floor and that the water damage in the small area under the right window occurred after occupancy; and indeed after August, 1989. Clarke agreed that the repair work of August, 1989, was well done and that cupping in the area referred to was evident. He thinks the cause of the damage is likely from water spillage from flowerpots which he said he saw in the area. Richardson denied the pots were ever there and said that only a lazy-boy chair had stood in the area.

Counsel for the Program could see neither defects in workmanship nor in material here. Since experts said that such damage will occur in two - four weeks after water spillage, she

finds that the complaint was either not in the first year after occupancy or was remedied by the work of August, 1989, or happened later where no warranty could apply.

The Tribunal finds that the onus is on Richardson to prove when the damage did, in fact, occur and we are unable to accept that the claim has been proved as an item to be warranted by the New Home Warranty Program.

Caulking of Ceramic Tile in Vestibule:

The item in Schedule "A(2)" states:

6. Complaint: Caulking Used on Ceramic Tiles in Front Vestibule

Explanation: It was observed that a grey caulking was used to fill the gap between the edge of the foyer ceramic tile and the front entrance door and window frame. No defect in material or workmanship was observed with respect to this application. It was noted that this caulking has become soiled, consistent with normal wear and tear associated with two years of occupancy.

The decision letter notes:

In reference to #4, caulking at the ceramic tile in foyer:

I agree with the observation Mr. Moreau made in his report dated October 25, 1990, and his ruling of normal wear and tear is appropriate.

While "foyer" is referred to in the decision letter, it is agreed that the area is more precisely known as the "vestibule".

Richardson complains of the messy job done in applying this grey caulking around the perimeter of the vestibule where there is a gap between the rigid tile and the movable wood trim.

Moreau's view of "soiling" was supported in Mayhew's decision letter, but Richardson noted that the repair work was done

on March 1, 1990 so that only some seven months had, in fact, passed until the inspection.

The Tribunal accepts the evidence and the photos of Richardson that the caulking is messy and shows poor workmanship. We direct the Program to have the caulking removed and replaced in a good workmanlike manner.

Basement Floor Crack Repairs:

In Schedule "A(2)" of the Conciliation Report, we read

1. Complaint: Floor Cracking in Garage and Basement

Explanation: The observed hairline cracks in these two areas are consistent with the normal shrinkage of materials when drying after construction, and as such are strictly excluded from this warranty under Section 13(2)(d) of the Act.

While these cracks in the basement floor may not have had to be repaired, Richardson showed photographs where cracks had been filled with silicone material, and he complained that he could not now paint his basement floor since paint will not adhere to the silicone. He noted several small chips out of the floor as well and believed that they resulted from attempts to clean up spilled silicone.

This matter was not dealt with in Mayhew's visit and is not referred to in the decision letter. The cracks were agreed to have been about 1/16" wide and 3/16" deep and are consistent as being shrinkage cracks. If repairs are attempted, the question before the Tribunal is do they then become warrantable items so that a cement filler should have been used and further repair with it should be ordered. Richardson thinks the work should be redone.

Moreau disagrees in that no repairs were needed initially and further that the result is not improper. Mayhew saw the repairs as reasonable and the chips as being the size of the eraser end of a pencil.

Counsel noted that silicone is commonly used for any hairline crack repairs and that completion of a basement with carpet or floor tile would hide any problem. Since only very few persons would seek to paint a basement floor, she finds the work not sloppy or improperly done.

The Tribunal can find no proven defect in the silicone repairs to the basement floor nor any importance in the fact that several small chips are out of the floor. The Tribunal directs the New Home Warranty Home Program to disallow this claimed item.

The Countertop:

Richardson said that the original beige countertop did not fit in the ensuite bathroom and was complained about to the builder site foreman, Brian MacDonald. Oak veneer splash boards were applied to each end in an attempt to hide the gaps in both bathrooms. A proper fitted countertop was asked for and these were installed very well about March 1, 1990.

However, Richardson said that the original beige colour could not be duplicated as he was told, and he therefore agreed to a colour similar to that in the other main bathroom. Richardson wanted a "light gray" and complains that a "dark gray" countertop was installed. Since the bathroom has only a small window on the north wall, Richardson believes that the darker countertop makes the room seem smaller and cramped. Formica samples were shown to the Tribunal where an "Orchid Haze No. 750" was wanted, but a "Gray Fog No. 961" was put in.

The photographs submitted fail to show much of a difference but the samples do appear quite distinct; in that very fine light gray grid on a darker gray background is lighter in colour than the solid colour which was installed.

The complaint of the Conciliation Report appears in Schedule "A(1)":

8. Complaint: Ensuite Bathroom Countertop

Observation: The main issue of this complaint is that the color of gray, of the countertop, is not "light" enough. A variation in shade is not a matter of material defect or poor workmanship and therefore not covered by this warranty. It was noted however that the required caulking of the back and side splashes has not been applied.

The decision letter states:

In reference to #3, Colour of Countertop in Ensuite:

The existing countertop had been installed in a good workmanlike manner, except as previously stated in Item #8 of the Schedule "A(1)" in the Conciliation Report, dated October 25, 1990.

The dispute is the colour of the countertop (shading). However, the Warranty Program has no mandate to conciliate such a dispute.

Richardson agrees that the countertop does fit very well, but would really prefer the original light beige colour and asserts that the New Home Warranty Program should install such a new countertop of the correct colour at a likely cost of about \$450.00.

Moreau states that the colours are similar and that there is no defect in workmanship or materials here. Since the rule covering substitution was not in effect until June 30, 1988, he sees no choice but to find that there is no defect here which the Program should be required to remedy.

Mayhew agreed that there was a colour difference, but the colour choices initially were those of the builder and the substituted countertop was well-made and properly installed.

Counsel in her summation reviewed the rules for an obligation if there is a substitution. Since the rules apply only to Offers to Purchase after June 30, 1988, she stated that the Tribunal could only act if there was a defect and there is none here. A wrong colour shade is not reason enough, in her view, to tear out a well-made and well-fitted countertop.

The Tribunal agrees with that conclusion and can find no defect here that must be remedied. The Tribunal directs the New Home Warranty Program to disallow the claim for a new countertop.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs that the Program replace the scratched left-front bedroom window and replace the caulking in the vestibule, and that the Program disallow the other claims made in this appeal.

JAMES D. SIMM and
DR. CYNTHIA TRANN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

JAMES D. SIMM and DR. CYNTHIA TRANN,
appearing on their own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

RONALD MOLDAVER, Q.C., representing Presidential Homes
(Westfield Estates) Limited

DATES OF HEARING: July 27 and 28, 1989;
January 25, 26, 29, 30, 31, 1990;
February 1 and 2, 1990;
October 22, 23, 24, 25, 29, 30, 31, 1990;
June 4, 10 and 11, 1991 Toronto

REASONS FOR DECISION AND ORDER

This hearing took place over 19 days spread from July 27, 1989 to June 11, 1991. The resolution of the many claims made by James Simm ("Simm") and his wife, Dr. Cynthia Trann ("Trann") dealt with only one of the homes built by Presidential Homes (Westfield Estates) Limited in the Westfield Estates subdivision in the Town of Whitchchurch-Stouffville. The situation concerning this and the other homes in turn lead to a Proposal on April 26, 1989, by the Ontario New Home Warranty Program to revoke the registration of the builder. The evidence with respect to an added three properties had taken five earlier hearing days and will continue for a possible further 12 days in September, 1991.

The completion of the evidence in the Simm/Trann claim is, therefore, a hearing and a decision made also within the overall revocation hearing of the builder.

On February 23, 1987, Simm and Trann entered into an Agreement of Purchase and Sale with the builder for the construction of a new home to be built at 491 Aintree Drive in Stouffville. The purchase price was \$250,490.00, and the closing date was set for October 17. An optional extra was agreed to with the payment of \$8,000.00 for a circular stair to the basement; and there were also certain kitchen cabinet and other flooring and fixture upgrades for a further \$5,189.00. The house was enrolled in the New Home Warranty Program and possession was taken on December 22, 1987.

A Certificate of Completion and Possession was signed which had a seven-page deficiency list attached and a further two-page list as well. A further seven-page list was made on June 20, 1988. In addition, Simm corresponded with the builder and officials of the New Home Warranty Program and the Toronto Home Builders Association about the complaints to be resolved.

A request for a conciliation was made on June 22, 1988; and this took place on September 21, 1988. David Steele represented the builder and the inspectors for the Program were Nick Panagopka and L.S. Thurston. An additional summarized seven-page deficiency list had been prepared on August 21, 1988. The Conciliation Report of October 21, 1988, set out 23 items in Schedule "A(1)" as warranted and 44 items on Schedule "A(2)" as not warranted. The Program set a reserve of \$4,370.00 to cover the cost of the warranted items.

A letter with a further seven-page summary of complaints was sent in to the Program and a copy thereof was sent on to the builder on October 27. This led to a second conciliation visit on December 8, 1988.

As of December 7, 1988, Simm prepared a "Grand Unified Deficiency List" (GRUNDL) with all known items and with references thereon to the several conciliation schedules and to the Ontario Building Code.

In the sequence of events which will be further explained in the review of evidence, there was then an Order to Comply from the Town of Whitchurch-Stouffville on December 8, 1988. That Order required 14 corrections due to violations of the Ontario Building Code.

Also, the duct distribution system design was questioned as of November 18 by an advisor with the Ontario Ministry of Energy

and a Heating System Evaluation Report was obtained by Simm from W. Douglas Geddes, a consultant, as of November 23, 1988. A heat loss calculation was suggested in that report and Simm had one prepared by A.A. (Tony) Woods of Can Am Air Leakage Control Systems Corporation.

This all led to a letter of January 27, 1989, in which the Program offered to settle the total outstanding list of concerns and complaints for \$10,800.00. This decision letter set forth the usual information as to the appeal procedure. The offer was rejected and the appeal came to the Tribunal and was scheduled to be heard on June 14, 1989. As a Proposal to revoke the registration of the builder had been issued on April 26, 1989, and an appeal was taken, agreement was reached to have the Simm and Trann appeal heard within the context of the revocation appeal so as to avoid duplication of hearings and possibly, therefore, to proceed more expeditiously.

During the 19 days, the Tribunal heard evidence in this appeal from 12 witnesses, whose qualifications will be described.

For the appellants were:

Roy Abraham, P.Eng. ("Abraham") has had more than 30 years of building experience after graduating from the University of Toronto in 1948. He has been a builder and general contractor in partnerships and solely, and has been called as a witness on many appeals or claims as his inspection reports are used by his clients. On cross-examination, he agreed that he was a registered builder in the Program in 1985 and paid out five complaint claims of the 8 houses built with his registration then being revoked. He has been registered as a builder under the Plan for the last year, he said.

A.A. (Tony) Woods ("Woods") for 10 years has conducted Can Am Air Leakage Control Systems Corporation, is a Bachelor of Science in Physics, and develops insulating and ventilating studies and has been an energy conservation consultant to banks, boards of education and government ministries. He assessed the Simm/Trann home.

Duncan Hannay, P.Eng. ("Hannay") is a House Inspector and a member of the APEO. He has

inspected from 1,800-2,000 homes in the past five years and is an instructor for real estate boards and a writer, radio and TV commentator. He is a 1985 Mechanical Engineering graduate of McMaster University.

John D. Lowood ("Lowood") is the Executive Director of the Structural Board Association which is a trade group of manufacturers of waferboard.

Dr. Sylvia Trann ("Trann") graduated as a Veterinarian from the University of Guelph in 1983 and now has her own part-time local practice. She is kept busy with two small children and four dogs and readily admits to no knowledge of construction or of the requirements of the Ontario Building Code. She wants a warm and comfortable home.

James Simm ("Simm") has three years of university training and has a personal interest in construction and science. He is a Project Manager for Broadcast Services and interprets drawings for the installation of communication centres such as that in the CN Tower. He has diplomas in Digital and Audio Electronics and a broad general knowledge of technical items with an ability to read and understand plans.

The Ontario New Home Warranty Plan called three witnesses:

Ed Perryman ("Perryman") is the Manager of the Toronto Regional Office of the Program since September, 1989. Originally a carpenter, he was for 14 years a building inspector in Barrie and joined the Program in 1985. He is familiar with all of the Presidential Homes' complaints and he visited the Simm/Trann home to review all of the GRUNDL items.

In his reviewing memo of December 8, 1988, he cited three outstanding issues, in his opinion, to be:

- (a) the homeowner does not feel he received all of the items that he thought he would get;

- (b) defects in material and workmanship; and
- (c) this homeowner is requesting perfect quality on every aspect of the dwelling.

Tibor Pal ("Pal") is a Structural Engineer with 26 years' experience as a consultant. He has done work for the Program for 10 years and has had a variety of other clients for long terms. His visit to the home was on December 8, 1989, with Perryman, Panagopka and Stryko of the Program's staff. He received the GRUNDL list of complaints from Simm and independently looked at each structural item.

Graham Adams ("Adams") is a 1952 graduate in architecture from the University of Toronto. He did the feasibility study for an Ontario Building Code and then directed the preparation and was the Director of the Building Code Branch in the Ministry from 1976 - 1983. He is now a consultant who also is involved with the National Building Code. He visited the home on July 26, 1989, and spent one and one-quarter hours there reviewing a copy of GRUNDL in the presence of Simm.

The builder as a party to the proceedings in this appeal called three witnesses:

Peter Ross ("Ross") has been the Service Manager for the builders since January, 1989. He has been to the Simm/Trann home on eight or nine occasions and reviewed the Conciliation Report.

Nick Cerquone ("Cerquone") is a plumber and owner of Toronto International Plumbing. He did the initial plumbing work on this house and also does any repair work as required by the builder.

David Steele ("Steele") was the Construction Superintendent for the builder for two years until the end of 1988. He supervised 124 homes in Pickering and now is a Superintendent of Maintenance for several buildings at the University of Toronto. He represented the builder at the conciliation of September 21, 1988.

By the time of concluding argument for the parties, a number of the items in GRUNDL had been abandoned or had been otherwise resolved. The Tribunal has reviewed all of the evidence of all of the witnesses on all of the outstanding items continued to be claimed by Simm and Trann in GRUNDL. Therefore, we set out our summary of the evidence for each outstanding item and our conclusions, with an assigned dollar value for each item accepted in the appeal.

1.1 Ensuite drain is loose and noisy. A(1)

This item is on Schedule "A(1)" of the Conciliation Report of October 21, 1988. Abraham's Report notes this drain in the second-floor bathroom as being loose and that it should be fixed. Trann noted the complaint on moving into the home and Simm confirmed the noise. Perryman noted that the item was on "A(1)" list. While Cerquone said that the problem had been fixed, Steele was uncertain. The Tribunal accepts the claim as valid and puts a value of \$50.00 to repair the complaint.

1.2 Attempted repair of scratches and marks has (sic) left the surface of the oval bathtub dull, and some scratches remain. Inasmuch as we bought a new house, we expect the fixtures to be new as well. The tub looks 20 years old in its present condition. A(2)

This complaint received the following comment in the Conciliation Report: "The repair has been completed in an acceptable manner." Abraham commented on the claim that, "We would not consider this to be a serious item as one would have to look quite hard to see the scratches that do exist." Trann also saw the marks. Simm would accept reglazing instead of replacement if the work was properly done; but the Program refused that suggestion. Perryman could see no defect and concluded that the claim is not warrantable. The Tribunal agrees, and directs the Program to disallow the claim.

1.5 Ensuite WC leaks sewage at the base, again. These toilets are "seconds" and should be replaced with American Standard or the equivalent, as in other houses in this subdivison. (c.f.11.2) #2

Abraham saw this, and called in his report for the leak to "be fixed or replaced as you suggest." He set a repair cost at \$100.00. Simm noted no rocking motion and said that the toilets are the least expensive line, but are not "seconds". Trann had noticed this in the first few months of occupancy. The toilet is functional and Perryman did not observe any leakage on his inspection. In conclusion, counsel for the Program said that this was not a warrantable item and counsel for the builder said a repair had been made. The Tribunal accepts Perryman's report that no leakage is evident and directs the Program to disallow the claim.

- 1.6 Due to shoddy workmanship, copper fittings at WC supply taps are unsightly, and the one in the ensuite drips. #2

Abraham's Report called for the chrome-plating of the exposed supply lines at an estimated cost of \$250.00. Simm showed a photograph of the fitting and claimed that too much solder had been used causing a messy appearance. Perryman believes that the shut-off valve should be replaced at a cost of \$25.00. Ross was uncertain as to whether repairs had been made, and Cerquone thought that any problem may be caused by sweating which can be corrected just by tightening the nut. Counsel for the builder claims that the repair was done and was "signed off" by Simm. While there had been a leak, the Tribunal finds that the appearance issue is not now a warranted item, and the Program is directed to disallow the claim.

- 1.7 Movement of shower base has not yet been repaired.
A (1)

This complaint is Item 8 on Schedule "A(1)" of the Conciliation Report:

8. COMPLAINT - Severe failure of grout around shower base

OBSERVATION - Homeowner advised that this complaint referred to movement in the fibreglass base at the northwest corner of the ensuite washroom's shower stall when pressure is applied. This item has not been completed in a good workmanlike manner and the builder is responsible to correct.

Abraham refers to this item in his report as: "There is a gap between the shower base and the wall. We do not know whether this can be fixed without serious repairs."

In his view, simple caulking may not be enough and full repairs with all trades could cost up to \$2,500.00. He agreed that the Perryman estimate of \$500.00 could be correct depending on the time and material of repair which original trades would charge to the builder.

Hannay noted that if there was any leakage of water there had been no damage observable so far. Trann had complained of this but no evidence of any leaks has been seen. Caulking has cracked off due to movement and replaced caulking has also failed. Simm believes that some tile will have to come off, and then the shower base moved and remounted in a secure fashion.

Perryman agreed that this was a warranted item and Ross stated that the original base was likely suitable but an early leak and the exchange of the original base for the correct colour has completed necessary repairs.

Simm believes that the base of the shower is now sound but wants cracked tiles to be replaced. Since the matter is warranted, the Tribunal directs the Program to allow this claim and we set a value of \$500.00 for the necessary work.

1.8 Drain from kitchen sink has sagged badly.

Abraham agreed that support should be given to this drain and sees the cost at \$50.00 as this is not a major item. While Trann had no personal complaint about this, Simm wants the pipe to be properly supported using hangers. The Program agrees that this should be done and Perryman sets a cost of \$25.00 for the work.

Ross says that the work had been done and Cerquone says he put in supports and they were taken out. The Tribunal agrees that this is a warranted item and directs the Program to allow this claim to a value of \$25.00.

2.1.1 Dining room light fixture is not centred, as on the approved plans. A(2)

This complaint appears in Schedule "A(2)" of the Conciliation Report:

6. COMPLAINT - Dining room light fixture is off centre.

OBSERVATION - Homeowner advised he felt that the dining room ceiling light fixture should have been centred in the ceiling the full width of the room not to the approximately 18" wide dropped ceiling area along the length of the dining room east wall.

COMMENT - Personal preferences to specific locations of light fixtures is beyond the scope of the Warranty Program.

Abraham noted that the light is not centred on the gross floor area of the room; and saw a cost of \$500.00 to do the job. Trann commented that the fixture was off centre but did not know by how much. In Simm's opinion, a hole had to be cut in the ceiling, the junction box moved, if possible, with new wiring and then closed in, although the joists run the wrong way for easy resolution of the problem. Here the location is not as the plans show and Perryman's view is that there is no requirement for centring. Simm views this as an issue of workmanship and not as a contractual matter with the builder. He agrees that there is no violation of the Ontario Building Code. Since the Tribunal can see no defect, no damage and no Code violation, we must direct the Program to disallow this claim.

- 2.1.3 Plated finish on coach lamps is deteriorating. To call this "normal wear and tear" makes no sense; this isn't even normal weathering. It is a defect in materials.

This complaint appears on Schedule "A(2)" of the Conciliation Report:

10. COMPLAINT - Finish on coach lamps is deteriorating.

OBSERVATION - Homeowner indicated the brass plated finish on the three coach lamps at the exterior front of the home is pitted and deteriorating.

COMMENT - This item is excluded from warranty as per Section 2.1(c) of the Warranty Certificate, however builder previously agreed in a letter dated July 27th, 1988 to have the electrician contact the manufacturer for a replacement.

Abraham wrote that the fixtures are of poor quality and set a price of \$200.00 to replace all three of them. Trann stated that polishing of the lamps is not possible and said that she had not personally complained to the builder or to the Program inspectors about this. Simm set a minimum replacement cost of \$100.00; but Perryman saw the concern as one of normal tarnishing and did not see any pitting damage.

The Tribunal finds this to be a warranted claim based on defects in material and directs the Program to replace the three light fixtures at a cost of up to \$150.00.

2.6 Gap in ceiling at light fixtures in basement foyer and southeast bedroom.

Abraham believes these holes should be repaired and sets a cost at \$50.00. Trann sees a gap of less than one-half inch but Simm wants this item repaired. Perryman's report acknowledges a gap which should be repaired and he agrees with the estimate of \$50.00. Ross could not recall the item. The Tribunal agrees that this is a warranted item and directs the Program to make the necessary repairs to a cost of \$50.00.

2.7 Wood screws used in tapped holes and light fixtures. This repair has been deferred at our request until some of the more important items have been addressed. A(1)

The Conciliation Report agreed that machine screws should properly be used on the plates in three bedrooms as a warranted item. Trann had made no personal complaint about this, but Simm called for the replacement of all

of 12 electrical boxes. He cannot retap the holes and believes that a day's work could do the job at a cost of perhaps \$600.00. Perryman would have these screws replaced at a cost of \$25.00; while Steele said that the item is outstanding because Simm would not allow just the screw replacement.

The Tribunal finds this complaint to be a warranted item and directs the Program to replace the screws in the three bedroom plates to a value of \$25.00.

3.0 HEATING AND INSULATION

In general, the house is very drafty and cold, and we cannot get enough heat out of the furnace to heat half the house on a cold night. Some rooms are very cold. An independent professional analysis has shown that there are very serious problems with the envelope and the duct work. Their formal reports are attached to this list. The following is our own assessment of the problem.

- 3.1 There is insufficient heat output from the furnace to satisfy ref: 9.34.1.3.(1) of the Building Code #2, 3
- 3.2 There appears to be insufficient insulation to satisfy the requirements of B.C. Ref: 9.26.2.1 #2, 3
- 3.4 As evidenced by the breezes which enter the house freely, and can be felt blowing in around heating ducts, electrical outlets and under the floor, it seems safe to assume that Ref: 9.26.5.3,...7, & .8 have not been satisfied either. #2, 3
- 3.5 The windows will pass rainwater, leave alone substantial air infiltration, as governed by B.C. Ref: 9.39.6.4. The basement windows are very poor fitting and pass palpable breezes. #2, 3
- 3.6 Return air duct from master bedroom is non-functional, and the one in the family room is nearly so. The latter has also caused a serious code violation . #2

- 3.8 Htg. register in master bedroom is away from wall. #1
- 3.9 SE bedroom register is misplaced by over 4'-room is cold. A(2)
- 3.10 Htg. duct installation does not conform to the duct design.
- 3.11 Heat loss calculations do not account for infiltration.
- 3.12 Air infiltration at patio door is excessive, contravenes B.C. Ref: 9:39.6.2

Many of the heating concerns were included in Schedules "A(1)" and "A(2)" of the Conciliation Report. Complaint 3.1 follows from items 16, 17 and 22 of Schedule "A(2)":

- 16. COMPLAINT - House is very cold in winter. Ensuite bath is painfully cold.

OBSERVATION - Homeowner advised that the northwest, northeast (master) bedrooms and the ensuite washroom are cooler than the balance of the home. There is a total of six window units in the 2nd storey north wall of the home for the three rooms noted above and there is a large open field on the northern side of the home. The thermostat is located in the dining room within 4' of the stove. Builder agreed to supply a copy of the heat loss calculation for this unit.

COMMENT - Unable to determine any defect in workmanship or materials with regards to this concern at the time of this conciliation. Homeowner to contact the local building department with regards to the installation and inspection and any approved heating details.

- 17. COMPLAINT - Bulkheads to contain heating ducts are 1) overly large, 2) not on drawings, and 3) not in other houses.

OBSERVATION - Homeowner advised he felt that the approximately 18" x 16" boxed in area at the northwest and northeast vertical corners of the living room and the approximately 4" x 12" boxed in area at the southeast corner of the laundry room are either overly large and/or should not be present in the rooms.

COMMENT - Personal preferences to methods of construction and/or design is beyond the scope of the Warranty Program.

22. COMPLAINT - The house is drafty throughout. In certain places a strong wind will blow out matches.

OBSERVATION - Homeowner advised that this complaint referred to air movement entering the second floor hall from between the double doors to the northeast (master) bedroom when the units are in a closed position.

COMMENT - Same as comment in item #17 on Schedule "(A2)" of this Report.

Complaint 3.4 comes from both the Schedule "A(1)", item 22 and also from Schedule "A(2)", item 12:

22. COMPLAINT - Caulking needed in several places

OBSERVATION - Homeowner indicated the caulking along the arc of the plywood panel above the lower storey windows on the front of the home is concaved and separated from the brickwork. This item is considered warranted and has not been completed in a good workmanlike manner. The builder is responsible to correct.

12. COMPLAINT - Ductwork is loose, leaky, sharp edges, many places.

OBSERVATION - Homeowner advised that the first portion of this complaint was satisfactorily completed by the builder prior to this conciliation, that the leaky portion of this complaint referred to taping the joints of the warm air supply ducts in the basement as air movement can be felt at a few of the joints and that the latter part of this complaint referred to a sharp edge on the bent flange in the duct at a boot near the southwest corner of the basement. The latter part of this complaint is considered minor in nature and is unwarranted.

Complaint 3.5 develops from Schedule "A(1)", item 9:

9. COMPLAINT - The fit of doors and windows is abysmal.

OBSERVATION - Homeowner advised that this complaint referred to the following concerns, a) the exterior glass panel of the sliding glass door unit required adjustment, b) a few of the interior doors scuff the surface of the carpet when operating, and c) there is a leak near the bottom western corner of the four-piece type sliding window units in the north wall of the dining and family rooms. This item is considered warranted and/or has not been completed in a good workmanlike manner and the builder is responsible to correct.

Complaint 3.9 develops from Schedule "A(2)", item 15:

15. COMPLAINT - Southeast bedroom duct is mislocated by 4' or more.

OBSERVATION - Homeowner advised he felt that the warm air supply duct in the southeast bedroom floor adjacent to the exterior south wall should have been installed approximately 4' further east between the two windows in the south wall.

COMMENT - Personal preference is (sic) to specific locations of a warm air supply duct adjacent to an exterior wall is beyond the scope of the Warranty Program.

Woods visited the Simm/Trann home on November 23, 1988, and conducted tests to ascertain furnace needs and their leakage. The latter is measured using a door with a fan insert by which air is exhausted from the house and various pressures are measured. Figures are related to an Equivalent Leakage Area. For the Simm/Trann house, 1.52 square feet ELA was a much higher rate than the .5 to 1. square feet area usually found in a new home, he said. Gaps, cracks and holes are all calculated and their total makes up the square footage area, after the furnace, chimney and windows are closed off. He found extreme leakage in the basement along the foundation gasket. The attic insulation and ventilation appeared satisfactory. Basement window frames and various heating ducts had much leakage which Woods found not to be a workmanlike standard. He thought it strange to see such leakage through interior walls of the first floor of a new home. Excessive leakage on the second floor was also observed and a smoke pencil was used to trace streams of air entering the home, particularly around window trim. A major problem was suspected in the bathroom and shower perimeter and also the patio doors on the main floor were very leaky there. He saw poor workmanship in the duct work which he could view.

Woods was accompanied by Douglas Geddes who completed a Heating System Evaluation Report for the Simm/Trann home. That Report told of holes too small in the return air duct in the basement, poor fittings, pipe runs too long and poorly taped and a blocked return air chase due to a medicine cabinet being built into it.

Woods concluded that extreme thermal discomfort would exist in this house and he thought that repairs or indeed perhaps the installation where missed of an air vapour barrier would be needed. He would take down interior drywall at a possible cost of some \$40,000.00 - \$50,000.00, including repairs and redecorating. Caulking, sealing and foaming might do the necessary work for \$3,000.00 - \$4,000.00 along with \$5,000.00 to take out interior walls to repair chases and \$3,000.00 - \$4,000.00 to redesign ducts and take out and replace basement ducting. That alternative would then total some \$12,000.00. He referred to particular items in the

Town's Order to Comply which referred to duct work and to temperature concerns.

On cross-examination by counsel for the Program, Woods agreed that \$600.00 to heat this home annually was not excessive, but finds the leakage area of 1.52 square feet to be a drain of \$200.00. When asked if spending perhaps \$50,000.00 to cure that was reasonable, he replied that also the preservation of the home from moisture damages was important. While an air barrier is referred to in the Ontario Building Code, he agreed that it referred to buildings of more than three-storeys, and that the vapour barrier perhaps is performing as it should. If a good job of sealing and caulking is done, the maximum air leakage could be cut by about one-third but in his view, the bathroom and heating duct concerns would remain and would require repair. Woods estimated a cost of \$3,000.00 to redesign and change the routing of the duct work.

On cross-examination by counsel for the builder, he stated that the equivalent leakage area of calculation is not in the Ontario Building Code or in the Municipal By-Laws, but comes from a number of Canada Mortgage and Housing Corporation and National Research Council studies. Nine-tenths of a square foot would be a normal reasonable leakage area, he said; and repeated that a 30% reduction would likely occur by sealing the sill area and around the windows, wiring and pipe holes and vertical stacks. Woods admitted that no client has ever taken the \$50,000.00 solution and that most just seal and caulk.

Woods noted that the comfort level should be a temperature of 70 degrees Fahrenheit (22 degrees Celsius) in every room in the house on the coldest day of the year. While the basement is drafty, the major problems are in the bathroom and master bedroom area, he confirmed.

Woods stated that the use of several rolls of tape would have a dramatic effect on the basement drafts and he agreed with the final statement in the Geddes Report that:

A heat loss calculation would be required to determine if the furnace is adequately sized and a duct system design check would have to be made to evaluate the total system's capability to deliver the

required heat to all habitable rooms and its compliance with the OBC.

Hannay could not find a vapour barrier after looking at six locations on the second floor by removing registers and duct work, and he suspects that there is none. He could feel drafts along the north wall of the master bedroom area and suspects little or no insulation in the sheathing of that room's exterior wall.

Trann recalled speaking with a builder's representative, Al Barker, in early 1989 to complain of various drafty rooms. The house is 2,850 square feet in area and Mr. Martino did visit to show her how to change furnace filters.

Simm prefers the whole renovation as described by Woods in order to have a better standard for his new home than that of much less expensive repairs as would be done to an older home. He states that the 70 degree Fahrenheit (22 degrees Celsius) comfort level cannot be maintained. The order to comply by the Town sets out necessary work and he has given copies of both Woods' and Geddes' Reports to the Town. The second floor is generally drafty and cold air movement can be felt through kitchen counters, wall plugs and around the family room fireplace. In addition, leakage is apparent around the family room windows and patio doors. He stated that his heating bills are moderate only because the heat is turned down during the day and he uses several baseboard heaters.

On cross-examination by counsel for the Program, Simm stated his need to have floor spaces closed in and the cold air return rerouted. In his opinion, the chases should be packed with insulation, the fireplace inserts sealed, the hose bed and window sills caulked, weather stripping installed, ducts refitted and taped and the aluminum siding secured. All of this work would bring the 1.52 square foot leakage area down to a mid-normal range.

Perryman's Report contained the following comments:

3.0 HEATING & INSULATION

From a review of the air leakage report prepared by Canam corporation, it appears

that there are some problems related to the heating of this unit.

All exterior walls should be air sealed at the wall floor junctions, around all windows at the foundation. Wall and 1st floor system, gaskets should be provided for all electrical outlets or the exterior walls.

It is also the general feeling that some elbows could be eliminated from the duct system, and all joints must be taped to prevent heat loss.

Allowance - \$2,500.00

He repeated his views in his evidence and on cross-examination noted that there is no Work Order reference to a lack of vapour barrier. Therefore, he assumes under normal construction procedures that the barrier is present and that final entry point sealing will resolve much air leakage. Since there is no dampness or blue mould evident, Perryman believes that the house as constructed is working as it should. He noted that the Work Order from the Town was rescinded when heating loss calculations were submitted. The furnace is adequate in his opinion, and caulking and other sealing is the remedy wanted here. As the 19% moisture in wood evaporates, shrinkages occur which with sill plate gaps or tears in the vinyl barrier or minor gaps in the insulation can all lead to air entry.

Perryman agreed that placing certain of the items on the "A(2)" list would lead the builder to presume that they were resolved and that adding them back to a new commitment in his report would give the builder no opportunity to replace, repair or remove the concerns.

Perryman rejects the Woods' suggestion of replacing a vapour barrier since air barriers are not required in single-family homes and since the vapour barrier on the inside of the stud wall and lapped over the end of the second floor assembly need not be continuous.

On behalf of the Program, Pal reviewed the requirements to have sufficient insulation to make a house comfortable and to have a vapour barrier installed to protect the

entire insulated wall surface. Since the floor structure edges enclose an unconditioned or unheated space, the barrier need not be entire and all leakages are resolved by entry point sealing. On cross-examination by Simm, Pal stated that sealing should be satisfactorily completed in the \$2,500.00 allowance.

On cross-examination by counsel for the builder, Pal agreed that a better barrier will occur if the outside aluminum siding is sealed. Further that since the work order was rescinded, the item therefore "sealing and caulking as required" must have been attended to.

In reply, Pal stated that a vapour barrier is to stop condensation which would lead to blue mould and damage to the house. There is no evidence of any such condensation and the airflow will otherwise normally continue into a house since the vapour barrier will not stop these drafts whether it is continuous or not, he said.

Adams explained that there was no reference in the Ontario Building Code to floor space gaps because no complaints or problems had arisen therein. Adams confirmed that the Ontario Building Code does not require any barrier between the floors. On final entry point sealing, Adams said that he does not like a completely sealed house. The house must breath and caulking will minimize air entry. The Ontario Building Code looks primarily to structural, fire and health issues, he said. There is no evidence here of any mould or moisture inside the house in his opinion. He stated that a good heating system and proper insulation should give a comfortable house. Finally, he noted that any cut, joint, gap or staple can allow passage of air leakage. There has been no problem generally as he would know if such a concern existed. Since only disassembly would locate each internal minor gap, the entry point final seal is the way to remedy the problem.

Ross reviewed the letter of October 9, 1990, received from the Senior Plan Examiner of the Town which referred to Simm's request to have the Order to Comply set aside and which stated that as of October 2, 1990, the Order to Comply was rescinded. Therefore, Ross sees no current concerns by the Town with the heating system. In addition, he stated that caulking was done at the house and that the windows comply with the Ontario Building Code.

Simm notes that the heating concerns are the main area of his outstanding complaints. Counsel for the Program agrees that some work is needed as outlined in both the Geddes and Perryman Reports and \$2,500.00 is offered for that. But Simm says the house is too drafty to heat properly and he seeks a comfortable result. He further believes that the heating system is not adequate, and that there is just too much leakage to be resolved by final entry sealing. Since the Town is now satisfied to rescind the Order to Comply, the suggested remedial work is a reasonable response to resolve the complaints, he said.

Since there are no Ontario Building Code provisions for an air barrier in a Part 9 home, and no evidence that the builder did not install a proper vapour barrier, counsel for the Program states there is no warrantable claim here. In conclusion, Simm relied on Woods' Report which showed the home to have about twice the expected air leakage. While some repairs will do a "one-third" job, in Simm's opinion a higher standard should apply for a new home and the complete \$40,000.00 - \$50,000.00 job should be done although no one has ever done it before.

The Tribunal concludes from all of the evidence concerning the heating and insulation in this home that the existence of the vapour barrier is neither proven nor disproven. We do not agree that a new furnace is required. For the complaints 1, 6, 8, 9, 10 and 11 in this group, we direct the Program to hire a professional qualified heating contractor to consider the recommendations in the Geddes' and Perryman Reports and to advise and then repair the duct system to supply the recommended air distribution to each room. We direct that the system be properly balanced and that the resulting plans be certified by the Town authorities. However, we further direct that the off-centre diffuser along the bedroom outside wall in item 9 not be moved. We place a value of this necessary work to be \$3,000.00.

We direct the Program to disallow complaints 2 and 4 in this group as there is no evidence that insulation is missing and no requirement for an air barrier.

We direct that the Program allow complaints 3.5 and 3.12 and that they be remedied to a cost of \$200.00 by weatherstripping and caulking.

The structure and framing concerns for this house are set out in GRUNDL as:

- 4.0 STRUCTURAL/FRAMING
- 4.1 Holes cut to accommodate htg. duct for SW bedroom and the family room return air duct are too large and contravene B.C. Ref: 9.23.5.1. #2, 3
- 4.2 Floor joist exceeds the maximum span by nearly a foot (B.C. Ref: 9.23.4.1) There is excessive deflection of the joists. This particular flaw has affected the floors, walls and ceilings of the main and second floors above. (The ceiling (sic) has dropped by about 1".) Had the basement foyer been built properly, according to the plans, this code violation would not have occurred. This may also exist on the 2nd floor. A(2), #2,3
- 4.3 Floor joists under the laundry room contravene 9.23.9.4 (1) as regards framing into a steel beam and 9.23.9.5 as regards end restraint. #2,3
- 4.4 East end of several joists under the family room are not properly end-nailed. It appears there has been some movement here.
- 4.5 The main load-bearing wall in the house has had the top and bottom plates cut away in several places. B.C. Ref: 9.23.5.4

The item of holes cut too large was referred to by Abraham in his Report. He noted that "Holes in the floor are sloppy and should be packed with insulation", and he suggested a cost of \$40.00 to do this work. Repair or replacement of the cut floor joists was seen to be a cost of \$200.00, where the bearing capacity of the joists had been compromised.

On cross-examination, Abraham stated that the cold-air return should be rerouted and that reinforcement with a second joist is insufficient. Hannay reviewed Pal's report on structural matters which referred to these five concerns as follows:

4.0 STRUCTURAL FRAMING

- 4.1 The hole to accomodate (sic) the heating duct for the S-W bedroom was cut in the framing built up on top of the structural floor joists to provide floor level difference at the family room. The hole does not weaken the structure. The hole cut for the family room retron (sic) air duct was cut through a joist resting the full length on a steel beam and through the adjacent joist at 4" distance. The next joist at 12" is not cut. The hole through the joist on top of beam does not weaken the structure. The joist cut for the laundry tub drain requires reinforcing. Add one joist.
- 4.2 The two floor joists require reinforcing. Double each joist. The deflection of the floor appeared to be considerably less than the 1-1/2" reported.
- 4.3 End blocking is required.
- 4.4 End nailing is acceptable according to table 9.23.3.A of the O.B.C. Movement at the joist ends was not evident.
- 4.5 Top and bottom plates were cut to accomodate (sic) drain pipes. The cuts do not affect the structural integrity of the house.

In Hannay's opinion, the holes cut do weaken the joists and these should be resupported. Trann stated that she had no personal knowledge of the problems, if any, caused by these items.

Simm saw these various concerns as obvious items requiring repair. To him, the house is "boomy" and creaks and indeed moves noticeably. The holes as cut are too large and the drawings for the house show a double joist with a post so that the hole is below a load-

bearing wall with a single joist and no post. On cross-examination Simm admitted to counsel for the Program that this and the other four concerns are his own conclusions and not those of his witnesses.

Perryman reviewed his report which allowed \$150.00 to repair concern 4.1 and \$200.00 to double the overspanned floor joists. He accepted Pal's view that nothing need be done for the other three items. In response to Simm's claim that item 1 (and a further former item 8) were not answered thoroughly, Perryman said he believed all items had been reviewed.

Pal reviewed his statements in his Report as set out above, and confirmed his conclusions as to what should be done in each particular for the five items. The overspan concerns in 4.2 were considered by Abraham who observed some floor sloping but did not think that overspanning had concerned. Hannay, however, did note the sill plate to be out of level upon which the joists rest. This was one of his specific areas of inspection on his visit of January 10 - 11, 1990. He used a four foot level and noted a slope of $1 \frac{1}{16}$ " over 38". On cross-examination by counsel for the Program, Hannay agreed that there was no sag or bounce in the floor but that as built, it was simply not level.

Simm sees the slope as being not more than 1"; and notes a sill plate problem. This has been translated to the second floor to the use of pre-cut studs and ceiling cracks have occurred. Pal would resolve any concerns by doubling each joist.

On cross-examination by Simm, Pal agreed that the span was slightly below the Ontario Building Code requirements by being 8% short. Ross believed that the doubling work had been done here.

For complaint 4.3, Abraham saw these floor joists having an effect on the main floor with possible drywall cracks occurring if there is enough movement. He saw the remedy to be blocking at a cost of \$250.00; although if the floor had to be removed, the cost could be up to \$1,500.00. On cross-examination, Abraham noted that the joists could twist and that end blocks would resolve the problem, and counsel for the Program agreed that such work should be done. Simm agrees with Pal's conclusion in that reliance on a ribbon board is not good enough.

The end-nailing sought in complaint 4.4 was noted by Abraham who put a price of \$150.00 on the work. Simm agrees that there is a gap and Pal noted no movement in the joists.

The cutting away of top and bottom plates in complaint 4.5 also appeared in Abraham's report, who saw this not as good workmanlike action. He would correct four locations at a cost of \$1,500.00 since he believes the structural value of the bearing wall is otherwise diminished. This complaint was noted in the Conciliation Report on Schedule "A(1)" as item 12 and the builder was required to correct the problem. Hannay did not see the house under construction and could not confirm that the plates had or had not been cut. Pal saw no concern with any cutouts made for heating ducts.

In these complaints the witnesses were all in agreement that some or all of the matters need correcting, even though in argument counsel for the builder sought to show that these must have been attended to or the Town's Order to Comply would not have been rescinded.

The Tribunal directs the Program to resolve complaint 4.1 by resupporting the joists; complaint 4.2 by doubling the joists; complaint 4.3 by end blocking and complaint 4.4 by end nailing; and we value this total work to be \$500.00. We have no satisfactory proof of damages for complaint 4.5, and we direct the Program to disallow that claim.

5.0 FLOORING/CARPETING

5.1 Floors creak and groan in the following areas: A(1) & (2)

- main floor hallway, head of stairs to foyer
- laundry room, raised section of floor
- family room, south-of-centre
- upstairs, all rooms and hallway
- kitchen, near end of counter.

This complaint appears as item 13 in Schedule "A(1)" of the Conciliation Report.

13. COMPLAINT - Sub-floor panels installed improperly hence badly creaking floors and seams showing through the cushion flooring in the kitchen.

OBSERVATION - Homeowner advised that this complaint referred to the following concerns, a) several sheets of the sub-flooring material have been installed reverse to the manufacturer's stamped instructions, b) an east/west joint in the underlay is visible through to the surface of the linoleum on the breakfast area floor approximately 6' from the north wall, c) a noise can be heard when pressure is applied to an area of the floor at the following locations, c1) in the kitchen approximately 48" from the east wall at 24" from the south wall, c2) in the northeast bedroom along the line approximately 7' from the west wall, c3) in the walk area of the northwest bedroom, and c4) in the upper hall approximately 6' from the west wall. Concern a) is considered to be completed in an acceptable manner and is unwarranted. Concern b) is due to the slight expansion of the floor sheathing and is unwarranted. No visible defects in workmanship or materials was noted with regards to concern c4) and is therefore unwarranted. Concerns c1, c2, and c3) are due to loose floor sheathing and/or is excessive and the builder is responsible to correct.

Abraham noted the creaking of the designated floor areas in his Report, particularly at the laundry room and the master bedroom. He would lift the broadloom carpet and have screws used to repair this at a cost of \$500.00, as the aspenite subfloor is not secured. Trann noted that the floor creaking varies with the humidity. Simm stated that a child in a rocking chair or their four 60-lb. dogs can set off the house, and that the floors should be screwed down. He would have the glued-down flooring in the kitchen and bathrooms replaced as may be necessary. Ross said that this work was to have been done on October 13, 1990, when the visit of the repair crew was cancelled.

5.2 Seams and other defects are showing through the resilient flooring in the kitchen and main bath. This contravenes B.C. Ref: 9.31.2.7 A(2), #3

5.3 Subfloor panels installed improperly. Referring to ONHWP conciliation dated 10/21, A(1), item 13:

- a) we do not understand how ONHWP can consider these panels to have been installed in a workmanlike manner, when the clearly printed instructions are blatantly disregarded;
- b) we understand that wood usually shrinks as it dries. Under what conditions do wood panels expand, other than due to soaking up water (which we're sure they aren't)? Might this be indicative of a defect, then? Please advise.
- c) given that the panels are obviously, as per the manufacturer's clearly printed instructions, improperly installed; and that the floors have a lot of squeaks and groans, should we not consider the probable "cause and effect" relationship? A(1) & (2)

This complaint first arises in Schedule "A(1)" of the Conciliation Report as item 13 referred to above.

Abraham stated that seam lines show through the resilient flooring from the subfloor panel joints which may be more pronounced since the panels were installed upside down. He would take up the resilient floor and make good the subfloor panels and seams with screws and glue; at a cost of \$1,500.00.

Trann said the creaking was most noticeable in the kitchen while Simm had noticed small ridges in that flooring. Lowood said that the seams were not caused by the fact that subfloor panels may be upside down but that the cause was in the underlay of the flooring.

The question of the subfloor panel installation was mentioned by Abraham who saw no practical way to remedy that fact. Trann saw the printed spacing message as she looked up from the basement and Simm noted that these panels should be properly spaced at 1/4" to allow for movement of this glued material. Simm would open the seams with a circular saw and glue down the subfloor.

Pal's comments on the flooring in his report were:

5.0 FLOORING

5.3 The waferboard subflooring as installed is acceptable. The stamping of "THIS SIDE UP" on the panels, according to the Waferboard Association, is only for roofing application.

5.5 Some deflection is noticable on these floors, mainly where steel beams cross open room areas.

Pal saw no problem with the panelling installation and said he was told by the Waferboard Association that the roughened side with the printing is placed upwards when used for roofing so that the workers will not be as likely to slip, and the spacing message refers to that usage also. Adams confirmed Pal's opinion and said that this installation would cause no problem. However, Lowood said such panels are rarely used for roofing and since the long edges are tongue and groove, the panels will fit nicely if all are installed completely up or down. He said that gaps are there to allow expansion and contraction due to the variance of moisture contents in these chip and waferboard products. On cross-examination, Lowood agreed that a lack of gap may be due to natural causes; and a sanding machine would be used to level any edge differences. Lowood would stop any movement by gluing 2" x 2" strips alongside the top of joists and screwing them to the subfloor.

5.4 We consider the carpet seams around the stair railings to be unsightly, certainly not as per standard practice, and therefore not "workmanlike". A(2)

This complaint appears in the Conciliation Report as item 28 of Schedule "A(2)" as follows:

28. COMPLAINT - Carpet seams visible.

OBSERVATION - Homeowner advised he is not satisfied with the carpet seams at the doorways, however felt that the seams in the short pile carpet at the pickets around the stairwell should have been made in a different direction so as not to be apparent.

COMMENT - No noticeable defects in workmanship or materials was noted with regards to this complaint at the time of this conciliation.

Abraham said that the carpet finishing was poorly done with joining showing and underlay not carried through the stair pickets so that the rug level became lower there. He set a repair cost at \$400.00. Trann had complained of this item to Al Barker, a builder's representative, and Simm wants pieces of carpet strip filling in the underlay gaps apparent between the pickets of the staircase. While Pal may find this acceptable workmanship, Simm does not. Ross said that he has the exact carpet colour match on hand and would do the repairs if he had been allowed into the house.

5.5 Floors which are crooked. #2

- breakfast area
- ensuite bathroom
- both upstairs and downstairs hallways, above the joists which have sagged.

Abraham noted that, "The hallways of the first and second floors reflect the level difference in the basement -- difficult to rectify." He did not put an estimated cost on this item, but said on cross-examination that as much as \$10,000.00 would be needed to perfectly rectify the problem. Trann observed the problems personally and Simm said that pieces of furniture along the walls lean into the room, while the breakfast area has a low centre

point. Pal noted some deflection which had developed naturally, but in his opinion stated that there was no Ontario Building Code defect or workmanship issue here.

5.6 Varathane on carpeted stair. A(1)

This was noted on Schedule "A(1)" of the Conciliation Report as 15.

15. COMPLAINT - Varathane finish on stairs rough, varathane on carpeted stairs.

OBSERVATION - Homeowner advised he felt that the surface of the natural finished oak handrail and pickets are rough and that the latter part of this complaint referred to varathane hardened in the pile of the carpet on the 2nd tread from the head of the basement stairs. The first part of this complaint is considered to be completed in an acceptable manner and is unwarranted except for a section of the top guardrail around the stairwell opening in the 2nd floor hall. The latter part of this complaint is considered warranted and the builder is responsible to correct.

Abraham noted the matter in his report and suggested that the carpet should be replaced at a cost of \$250.00. While agreeing that if the varathane could be removed properly then replacement would not be needed, Simm said that apparently some workman had stepped in a varathane patch so the carpet was marked on each second step. Other treads were cleaned off, but this one was missed and then cleaning was not possible. Counsel for the Program agreed that this item should be attended to.

The Tribunal directs that repairs be done to the floors by power screwing or power nailing to resolve complaint 5.1 at a cost of \$1,000.00. The Tribunal does not accept complaints 5.2, 5.3 and 5.4 as items under warranty and finds no defects in item 5.5 for which the Program is liable. The Tribunal directs that item 5.6 be allowed and replaced at a cost of \$200.00.

- 6.2 All poured slabs (basement floor, garage floor, and porch) show clear marks of "striking-off" by moving a board back and forth across the surface, as per standard practice. The usual next steps, which obviously were not done - as evidenced by the texture of the surface - are "floating" and "trowelling", as required under B.C. Ref. 9.16.4.1. A(1) & (2), #3

In Schedule "A(1)" of the Conciliation Report, this matter is referred to:

17. COMPLAINT - Floors in porch not trowelled.

OBSERVATION - Homeowner advised that this complaint referred to the following concerns, a) homeowner felt that the surface of the poured concrete slab at the front entrance should be polished as stated on the working drawings, and b) there are numerous circular fine ridges from a float machine visible in the surface of the poured concrete slab in the basement. Concern a) is considered to be completed in an acceptable manner and is unwarranted, however concern b) is considered excessive and/or has not been completed in a good workmanlike manner. The builder is responsible to rectify.

Abraham confirmed that the "wood trowel" finish was not good enough and that a "steel trowel" finishing step should then have next been done. He would replace the floor to deal with other concerns at a cost of \$1,500.00. To him, on cross-examination, the variety of cracks suggest some upheaval while grinding at least is needed as the Program admits. His cost estimate is based on three days of work by a man with a rented grinder.

Hannay did not see the basement floor as extraordinary with its shrinkage cracks and had Simm drill holes to measure its depth using a coat hanger wire. A variance from 1 1/4" - 3" was measured and the Ontario Building Code requires 3". Trann admitted not having the details of this complaint.

Simm stated that he had done foundation and floor cement work during university student days and had operated the "helicopter" drying finisher. He saw the surface as too rough, with which view the Program agreed. Perryman confirmed in his Report the reference to conciliation item 17 above. Pal admitted that there were some rough areas in the basement but that the garage was finished off better. Adams agreed with Pal's opinion, and thought grinding of 1/8" would be sufficient although there was really no damage to complain about. In conclusion, the Program admits to the problem and would grind the floor but Simm is concerned about the weakening which would occur on a floor already too thin.

- 6.3 Neither the floor drain nor the sump well are at the lowest points of the floor. B.C. Ref: 9.16.3.3 requires that the floor drain be at the lowest point. A(2), #3

The Conciliation Report refers to this as item 30 of Schedule "A(2)":

30. COMPLAINT - Basement floor drain is not at lowest point, water will pool at various places.

OBSERVATION - Homeowner advised that prior to the sump pump installation water had pooled on the poured concrete floor approximately 1" deep in an area at the western end of the basement and at the basement foyer location near the centre length of the south wall. The basement floor drain is located in the southeast quadrant of the basement near the hot water tank and there is a sump pit located directly at the northeast corner.

COMMENT - Water should no longer overflow the pit to accumulate water in the above noted locations if the pump is maintained and kept in working order.

Hannay was concerned with the slope of the basement floor and used a 4' level which showed several locations where up to an inch of water could pool. While the slope was suitable for a hot water tank leak, it would not be for

a toilet leak in a finished powder room if installed as roughed in. To Hannay, the floor thickness was not a major issue. Trann saw water pools in the basement, and Simm stated that the floor does not have a slope to the floor drain. Perryman noted that the location of the sump is suitable and Adams said that there was no Building Code reference to location, but that the placing of the sump pump is a matter of ease and economics. The lowest point of the tiles around the footings is the real reference point for such matters, he said. A floor drain is not required for this house since there is no municipal connection, and the drain likely would just drain into the sump, he said.

- 6.10 Basement floor has a large number of cracks. This was reported to ONHWP in our deficiency list dated 88/06/20.

The issue of basement cracks first is noted in Schedule "A(2)" of the Conciliation Report at item 29.

29. COMPLAINT - For the purpose of this report the following complaints, a) water marks on basement walls and floor, and b) large cracks in basement floor were seeping water, will be combined as one item.

OBSERVATION - Homeowner advised that the poured concrete basement slab along several visible cracks in the floor and at the wall/floor junction around the perimeter of the basement area appeared damp before exterior grading and the sump area in the basement were completed and further advised that this concern has not been apparent since.

COMMENT - Power failure when there is a storm may cause this concern to become apparent and is considered an Act of God.

Abraham noted the cracks in the basement floor and was concerned more with the water marks which showed. On cross-examination, he thought that the water level could rise through the sump pump to cause flooding, but no blockage or failure of the pump had been observed. Trann confirmed that cracks are present and Simm believes that

the floor may have heaved since he can balance a straight edge on the crack junction. His expectation is to eventually have a finished basement and he could only use carpeting in the present situation with the risk of some flooding.

The Tribunal concludes from these three complaints that the basement floor should be replaced, the sump location properly done and the cracking therefore avoided. Accordingly, the Tribunal directs the Program to accept these three complaints and arrange the necessary work for which we set a cost of \$3,000.00.

- 6.4 Masonry joints are uneven and too large in many places. This problem exists in both the exterior brick and the stone fireplace.
B.C.Ref: 9.20.4.1. A(1), #2, 3

These concerns appear in the Conciliation Report at Schedule "A(1)", item 18 and at Schedule "A(2)", item 31

18. COMPLAINT - Gaps in mortar, poor brick cuts, uneven joints.

OBSERVATION - Homeowner advised that this complaint referred to the following concerns, a) gaps and/or voids in the mortar joints at several locations throughout the brickwork on the exterior walls of the home and garage, b) a gap in the brickwork at the rear hose bib and around pipe, and c) the bricks for the arch above the windows are rough-cut. This item is considered excessive and/or has not been completed in a good workmanlike manner. The builder is responsible to correct.

31. COMPLAINT - Mortar splashed over brickwork.

OBSERVATION - Homeowner advised that the builder had attempted to rectify this complaint prior to this conciliation, however still concerned.

COMMENT - Any remaining residue that may be do (sic) to the overspillage of mortar on the face of the exterior brick is considered minor and is unwarranted.

In Abraham's report, he found, "The stone fireplace is poorly finished -- although it is random in concept the stones are not in the same plane. The exterior brick necessary is quite fair but with some minor deficiencies." He set a cost of \$1,000.00 to remedy the situation of mortar splashes, with some cleaning and repointing. Trann said that the mortar was flaking off and Simm that the width of joints and splashes are enough to make the front of the house "ugly". He wants the fireplace pulled down and rebuilt. Perryman agreed that conciliation item "A(1)" number 18 should be attended to. Pal stated that only 1 percent of masonry joints were greater than 20 mm. (3/4").

- 6.5(b) Bricks pulled away from wall at patio door.
The attempted repair is not acceptable.
A(1)

In the Conciliation Report, Schedule "A(1)" item 23 states:

23. COMPLAINT - Bricks pulled away from wall at patio door.

OBSERVATION - Homeowner indicated the top portion of the brickwork on the western side of the sliding glass door in the exterior north wall of home is convexed with cracks in the vertical mortar joints at the corners of the western angled wall. This item has not been completed in a good workmanlike manner and the builder is responsible to correct.

Trann noticed this, and Simm said that this was an issue in the Town's Order to Comply. While repairs were done, the result is not satisfactory to him as the colour and size of bricks and the mortar do not match the original work. Pal did not refer to this item since he said he saw no observable deficiency.

- 6.6 Hole in brick for incorrectly located hose-bib needs to be repaired. A(1)

This is referred to in item 18 of Schedule "A(1)" of the Conciliation Report as set out earlier. Abraham sets a price of \$50.00 to correct this. Simm agrees that replacement should occur and the Program agrees.

- 6.8 Concrete voids at base of service entrance threshold. #2

This is also in item 18 of Schedule "A(1)" of the Conciliation Report, and again a value of \$50.00 is put on this item by Abraham. Simm referred to this obvious repair and the Program agrees.

- 6.9 L side of fireplace is not plumb. A(2)

Abraham agreed that "the left side of the fireplace on the join of the drywall is not plumb or neat." He would remove the stonework and replace the same with a good quality of mortar in a workmanlike fashion. A price of \$700.00 is his estimate. Trann noticed the problem and held a chalk-line to measure more than a 2" variance. The Program agrees that repairs are needed. Perryman would offer \$600.00 but counsel for the builder noted that this was not passed on to his client when a change was made after the item was shown as a new obligation to his client.

The Tribunal accepts these five complaints in 6.4, 6.5b, 6.6, 6.8 and 6.9; and directs the Program to complete the necessary repairs at a value of \$1,500.00.

- 6.5(a) Mortar mix has been identified as substandard -- too much sand -- as identified by Presidential's own bricklayer. Perhaps it should be compared to B.C. Ref: 9.20.3.A. #2, 3

This is also included in item 18 of the Conciliation Report in Schedule "A(1)". While Trann could not comment, Simm really had no evidence other than comments he heard from the builder's bricklayers. Pal found the mortar mix to be satisfactory and Perryman agreed.

The Tribunal believes that this complaint has not been proven and directs the Program to disallow this claim.

- 7.1 Back door on garage does not conform to B.C.
Ref: 9.6.4.1 re: exterior doors. #2, 3

- 7.11 Hinge on rear exterior door of garage
failed. #2

These items were referred to by Abraham who claims that the veneer mahogany hollow door is not an exterior type of door and that there should be three hinges instead of two. His estimated cost to replace is \$250.00, and he noted on cross-examination that this item was in the Town's Order to Comply. Trann said that the door is warped and the hinges do not hold; which Simm confirmed in his evidence. Perryman reported as follows:

- 7.1 The rear main door to the garage is a 1 3/4" thick door. It is my observation that this door is acceptable. However, it was only installed with one pair of 3" hinges, it is required to be installed with 1-1/2 pair of 3 1/2" butt hinges.
Allowance - \$100.00

The Tribunal accepts the evidence of Perryman and directs the Program to disallow item 7.1 and to allow item 7.11 with repairs to a cost of \$50.00.

- 7.5 Stair railings: dents, pits and blemishes in wood; sawdust, hair and steel wool in the finish; glue and pencil marks on the surface of the wood; wobbly and rough cuts in joinery. This is unacceptable. A(2)

These complaints appear in the Conciliation Report Schedule "A(1)" as item 16:

- 16. COMPLAINT - Stair railings joinery is very poor.

OBSERVATION - Homeowner advised he felt that the joint locations of the natural finished oak handrail were not completely satisfactory, that there are pencil marks left in the oak and the pointed ends of nails are protruding through the veneer on the basement stair closed stringer adjacent to the 2nd and 3rd tread from the foot of the basement stair. The first part of this observation is considered to be completed in an acceptable manner and is unwarranted. The concern with regards to pencil marks is considered minor in nature and is unwarranted, however the latter part of this observation has not been completed in a good workmanlike manner and the builder is responsible to correct.

Abraham confirmed these items and set a price of \$750.00 to repair them. Trann said the finishing is rough and Simm agreed. He wants the whole area sanded, the joints redone and then all to be refinished. The Program agrees that some work is appropriate. The Tribunal allows this item and directs repairs to a value of \$50.00.

- 7.6 Laundry room doorframe is twisted and not plumb.
A(2)

Trann had not observed this, but Simm said he wanted a straight frame and doorway. The Program finds the tolerance acceptable. The Tribunal finds that this item is not warrantable and directs the Program to disallow the claim.

- 7.7 Doorways and archways which are crooked:
A(1) & (2)

- archway from kitchen to family room
- archway from living room to foyer
- master bedroom walk-in closet door
- laundry room closet.

These complaints appear in the Conciliation Report Schedule "A(1)":

10. COMPLAINT - Many openings are not level, or plumb:

OBSERVATION - Homeowner advised that this complaint referred to the following concerns, a) the vertical edges of several openings are not exactly plumb, b) the outside corners of two openings when viewing in plan are not 90 degrees, and c) the vertical edges of the stone fireplace are not exactly plumb. The openings indicated by the homeowner with regards to concern a) are as follows, 1a) the family room window, 2a) the northern archway in the family room east wall to the kitchen, 3a) the archway to the living room from the front entrance hall foyer, 4a) the powder room entrance, 5a) the powder room window, 6a) the laundry room door, 7a) the northwest bedroom entrance, 8a) the northwest bedroom window, and 9a) the entrance to the master bedroom walk-in closet. The openings indicated by the homeowner with regards to concern b) are as follows, 1b) the opening to the living room from the front entrance foyer, and 2b) the opening to the kitchen from the front entrance foyer. Concerns 1a), 2a), 3a), 5a), 6a), 8a), 9a), 1b), and c) are considered minor in nature and are unwarranted. However, concerns 4a), 7a) and 2b) are considered warranted and the builder is responsible to correct.

Abraham sets a price of \$500.00 to do the necessary repairs while the Program would find \$300.00 enough. Trann had no complaint here, but Simm believes that drywall work is needed. The Tribunal agrees that the archway from the foyer to the living room does require repair and sets a value thereon at \$300.00; and directs the Program to disallow the other parts of the claim.

7.8 WINDOWS

Windows which are crooked: A(2)

- family room window
- powder room window - this one is so far out that it fouls the venetian blind;
- NW bedroom window.

These are also referred to in the Conciliation Report Schedule "A(1)", item 10. Abraham found the windows to be not level and out of plumb and the results not good and workmanlike. He would take the windows out for \$2,000.00 or adjust the interior casings for \$500.00. On cross examination, he agreed that the windows do open and close and adjustment of the casings would resolve most concerns. Simm would remove the windows, replace them with a smaller size and shim them as necessary for levelling; then replace any brick work as needed although he agreed that adjustments of casings may be enough at a cost of \$500.00. Perryman valued the necessary repairs at \$125.00 in his Report. The Tribunal accepts the need to make these repairs as warranted items and directs the Program to allow this claim and adjust all trim and casings on the three windows as required to the amount of \$750.00.

7.9 WALLS

Walls which are crooked: #1

- kitchen south and east walls
- dining room east wall
- ensuite bathroom south wall
- master bedroom south wall
- living room west wall and SE window
- main bathroom, over tub.

Again this comes from items in the Conciliation Report Schedule "A(1)", item 10. Simm gave evidence that some areas only need drywall refinishing. He stated that the heating duct enclosure in the kitchen is too large so the wall was moved around it. There are uneven conditions and he wants new walls in these areas. The Program agrees that the bump on the south kitchen wall should be repaired at a value of \$125.00 and that none of the other parts of the complaint are valid.

The Tribunal accepts the Program's view in this complaint and allows that one part of the claim with respect to the south kitchen wall in the amount of \$125.00.

7.10 CRACKED TILE

Cracked tile in foyer. This now has a second crack.
A(2)

This is referred to in the Conciliation Report Schedule
"A(2)" at item 21.

21. COMPLAINT - Cracked tile in foyer.

OBSERVATION - Homeowner indicated a crack
in one side of the "U" shaped cut ceramic
tile on the floor of the front entrance
foyer at the warm air supply duct. This
particular tile is not sounding loose.

COMMENT - This item is considered minor in
nature and is unwarranted.

Abraham would repair this with a new tile at a cost of
\$100.00. The Program agrees, and the Tribunal directs
that this claim be allowed to a value of \$150.00.

7.12 Aluminum door sills at front and side entrances
should be cleaned of dried concrete, sealer, etc.#2

Trann had no personal complaint here, but Simm wants any
dried concrete and sealer removed. Simm claims that this
condition is not workmanlike while the Program denies any
warranty here. The Tribunal directs the Program to allow
the claim and clean up the area to a value of \$50.00.

7.13 Re: ONHWP conciliation report of 10/21,
(A)(2), item 25. We do not consider it
unreasonable that the large (3/8" x 1/2")
incorrectly-drilled hole made by the
builder should be filled. The only
effective way of doing this, and at the
same time, leaving the correctly located
and sized (1/4") hole which we drilled to
keep the front doors from opening by
themselves when the wind was blowing, is
to replace the sill. We only waited 8
months for Presidential to fix it. A(2)

As noted, this is referred to in the Conciliation Report Schedule "A"(2) at items 25 and 26:

25. COMPLAINT - Front door - dead bolt does not fit hole in bottom.

OBSERVATION - Homeowner advised that he (the homeowner) widen the hole in the aluminum sill to accommodate the latch pin at the bottom edge of the western steel insulated front door and wished to have the sill replaced.

COMMENT - This item is excluded from warranty as per section 2.1(g) of the Warranty Certificate.

26. COMPLAINT - Front door - top dead bolt falls down.

OBSERVATION - Homeowner advised that the latch pin at the top edge of the western steel insulated door continuously fell to an unlocked position before the bottom latch was adjusted.

COMMENT - No visible defects in workmanship or materials was noted with regards to this complaint at the time of this conciliation.

Abraham would repair and clean up this complaint for \$150.00; but he noted on cross-examination that the bolt fits in the rebored hole and that the threshold has been cleaned up. Simm agreed that he had done the necessary work in August, 1988. He wants a new sill put in. The Program claims this is not a warranted item, but the Tribunal disagrees and believes the original wrong hole should be filled in to a value of \$10.00, and so directs the Program.

- 7.15 Large chip out of exterior door jamb in laundry room. #2

- 7.16 Weatherstripping on side door not done; on front door daylight can be seen through the gap. #2
- 7.17 Front door still has some dents. A(1)
- 7.18 Basement door is hung very loosely. Gap exceeds standard. Some doors have uneven gaps at jambs.
- 7.19 Cracked tile on step-up to shower in ensuite.

The Program agrees that all of these items are warranted and the Tribunal directs that they each be allowed to the values of \$25.00, \$25.00, \$200.00, \$50.00 and \$150.00 respectively for a total of \$450.00.

- 8.1 Sump well in basement is not located as per approved plans; this is also incorrect, w.r.t. lot drainage conditions. #1

Abraham said that this should be at the closest point to the ditch and not at the furthest end of the house. He suggested a dry well to block any future seepage at a total cost of \$1,500.00. Adams said that the location of the sump does not in any way affect its function and there is no defect or damage. The Tribunal agrees and must direct the Program to disallow the claim.

- 9.1 Front porch is too small, as per plans A(2).

This complaint appears in the Conciliation Report Schedule "A(2)", item 27.

- 27. COMPLAINT - Front porch smaller than shown on plans.

OBSERVATION - Homeowner advised that the front entrance poured concrete porch slab and foundation is approximately 44" shorter in width than what is shown on the working drawings.

COMMENT - This item is considered contractual and is beyond the jurisdiction of the Warranty Program at this time.

In addition, the complaint as set out in item 32 was reviewed here as

32. COMPLAINT - Ventilator decoration not supplied.

OBSERVATION - Homeowner advised she felt that the builder was to have installed a decorative circular grill on the exterior of the gable above the main bathroom window as indicated on the presentation (brochure) drawing.

COMMENT - Unable to determine at the time of this conciliation if compensation is required as the brochure is an artist's conception.

Abraham believes the ventilator shown in the plans is useful and decorative and would install the bricks around the louvred area at a cost of \$1,000.00. The porch is smaller than the plans for the house and is a for "1A" model with a reduced area and a gabled roof while the Simm/Trann house is a "1B" with a shed roof and a larger area below. The porch is 4' narrower than it should be and Simm says that it looks very odd and the pillars are off proportion. Abraham noted that there was no Ontario Building Code violation here and that the porch was usable. He saw a repair cost to be \$6,000.00.

Perryman acknowledged that the porch was not built according to plans, but said this was a matter of contract with the builder and not a warranty issue. Counsel for the Program said that there was no defect, no damage, no breach of the Ontario Building Code and no major structural defect in this claim. The Tribunal agrees and directs the Program to disallow the claim.

9.3 The 'breakfast nook/sitting area' feature on the back of the house is misplaced, relative to the front of the house by

approximately one foot. This affects the size of the family room, and the west wall of the master bedroom, negatively. A(2)

This was complained of in the Conciliation Report at Schedule "A(2)", item 23:

COMPLAINT - A bedroom wall was misplaced creating an unlikely corner at a sitting area window.

OBSERVATION - Homeowner advised he felt that the west wall of the northeast bedroom is installed approximately 10" too far east or the bay window area in the north wall of the northeast bedroom has been installed approximately 10" too far west as the northeast bedroom west wall does not line up with the western corner of the northwest angled wall of the bay window. No plans were reviewed at the time of this conciliation to verify the homeowner's concern.

COMMENT - This item is considered contractual and is beyond the jurisdiction of the Warranty Program at this time.

Abraham stated that the misplaced wall should be moved at a cost of \$7,500.00. He agreed that the 10" difference made the bedroom usable, did not affect load bearing and was not an infraction of the Ontario Building Code. He would repair because of the aesthetics since the wall does not conform to the plan and does not look good.

Simm sees many problems from the misplaced nook; since the steel beam is not where it should be. Therefore he says both the wall of the family room/breakfast area and the bedroom wall above are affected. There is no 6' return at the master bedroom doors and headroom problems are then carried on for the circular stairs to the basement. He says that really the foundation needs to be redone and everything else corrected.

Counsel for the Program repeated the four reasons why this claim should be disallowed. The Tribunal agrees and directs the Program to disallow the claim.

- 9.8 Porch attachment to roof is not as per plans, also not like other 1B's, looks like a mistake. #1

Here Perryman saw no defect and wrote:

It is difficult to determine the porch's attachment to the roof from the drawings since it would appear that one is a shed roof and the other is a gable roof.

In his file memo, he noted:

The beams for the roof system of the front porch have been set at the exposed face of the brick veneer. There is no defect or building code violation (sic) on this item. This item could be considered a design feature. If we have to consider further we may make an allowance for this item.

Allowance - \$500.00

While this may be structurally sound, Simm believes it looks like a mistake. If the porch was redone, Simm thought a bricklayer and carpenter could then do the necessary repairs.

Again Counsel for the Program sees no defect, no damage, no breach of the Ontario Building Code and no major structural defect. If there is any claim it is, in his view, a contractual issue between the builder and Simm and Trann. The Tribunal accepts that there is no warranty issue here and directs the Program to disallow the claim.

- 10.1 There are at least two damaged shingles on the roof. #2
- 10.2 The repairs to the roof shingles mentioned in item 21 of the conciliation report have not yet been satisfactorily completed. A(1)

- 10.3 Aluminum siding is wavy, dimply and poorly installed to the walls. Very little satisfactory progress has been made in this matter. There are also problems with the fascia in several places. Siding on NE corner rattles in high winds. A(1)

The Program accepts these three claims, the last two of which were in Schedule "A(1)" of the Conciliation Report at items 21 and then at items 19 - 20 - 22. The Tribunal directs the Program to allow these three items as claimed to a value of \$50.00, \$50.00 and \$750.00, respectively.

- 10.4 The roof shingles, or the sheathing underneath, have buckled in several places: #2

- over the master bedroom sitting area
- several other places along the ridge and edges.

This item is related to the claim in 10.2 and any repairs are seen by the Tribunal as included in the allowance of \$50.00 made for that item. The Tribunal directs the Program to disallow this particular claim.

- 12.1 Berm needs to be sodded, as per approved lot grading plan.

This was noted in Abraham's report and a cost of \$1,500.00 was estimated to grade, add top soil and sod. Simm said that he cannot get an occupancy permit until this item is completed and therefore could not sell his house. Counsel for the Program noted that this claim is part of the subdivision development agreement and is not a warranted item to which the Program has any responsibility. The Tribunal agrees and directs the Program to disallow the claim.

- 13.1 During the course of repairs to the powder room door, the privacy lockset has been replaced with a passage set. Also, gaps left in underlay and flooring have been left exposed. (also upstairs doorway) A(1)

Abraham set a cost of \$100.00 to repair this item. Trann confirmed the problem and Simm repeated the claim. Counsel for the Program agreed. The Tribunal directs the Program to allow the claim, in the amount of \$100.00.

13.3 Roof over garage leaks at NE corner. #1

Simm claims a repair of this could be done when the other roofing matters are looked into. The Program agrees that this is a warranted item. The Tribunal directs the Program to allow this claim in the amount of \$200.00.

13.4 Headroom over third stair treader from basement is insufficient as per B.C. Ref: 9.8.3.6. This is due to the stairs not being built in accordance with the plans, as per item 9.5. This item has been noted on the "Order to Comply" issued by the Building Department. #1, 3

This major claim received an estimated repair cost of \$10,000.00 by Abraham. In effect, Simm wanted the stairs moved six inches to the east as part of a rebuilding of the floors. Perryman noted that if the Order to Comply was discharged, the issue would no longer be outstanding. That Order to Comply was rescinded resulting in a minimal violation of the Ontario Building Code. However, it is acknowledged that finishing stucco work is needed to complete the area of the head room adjustments which were made. The Tribunal orders the Plan to finish the area with necessary drywall and paint to an amount of \$200.00.

13.5 Flue pipe is crooked, may be starting to topple.

Abraham noted this and set a cost of repair at \$150.00. Trann saw the crooked pipe and Simm thinks a wire or two are needed. The Program accepts this as a warranted matter and the Tribunal agrees. The Tribunal directs the Program to accept this claim to an amount of \$100.00.

14.3 Floor penetrations for ducts and pipes, etc. need to be adequately sealed. B.C. Ref: 9.10.15.10

Abraham saw a need to fill in the holes with insulation at a cost of \$50.00. Adams agreed that this was a minor but necessary matter. The Tribunal directs the Program to allow this claim to the amount of \$200.00.

In summary, pursuant to Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to allow the following claims from GRUNDL at the value assigned:

1.1	\$ 50
1.7	500
1.8	25
2.1.3	150
2.6	50
2.7	25
3.1, 3.6,)	
3.8, 3.9,)	3,000
3.10, 3.11)	
3.5, 3.12	200
4.1, 4.2, 4.3, 4.4	500
5.1	1,000
5.6	200
6.2, 6.3, 6.10	3,000
6.4, 6.5B, 6.6, 6.8, 6.9	1,500
7.11	50
7.5	50
7.7	300
7.8	750
7.9	125
7.10	150
7.12	50
7.13	10
7.15	25
7.16	25
7.17	200
7.18	50
7.19	150
10.1	50
10.2	50
10.3	750
13.1	100
13.3	200
13.4	200
13.5	100
14.3	<u>200</u>
<u>TOTAL</u>	<u>\$13,785</u>

MR. AND MRS. LAL SINGH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN HURLBURT, Member

APPEARANCES:

MR. AND MRS. LAL SINGH, appearing on their behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 8 January 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program to disallow certain claims of Mr. and Mrs. Lal Singh. The decision of the Program was given to the Applicants by way of a letter dated May 1, 1990 from the Program over the signature of Mr. Ed Perryman, the Manager of the Toronto-Regional office who was a witness on behalf of the Program at this hearing.

At the opening of the hearing, both parties agreed that there were three issues between them to be determined by the Tribunal:

1. Should the Applicants be awarded compensation for the delayed closing of the transaction?
2. Were the Applicants entitled to receive a vegetable spray faucet attachment which they claimed they did not get?
3. Were the Applicants entitled to receive laundry upper cabinets which they claimed they did not get?

Re: Issue of compensation for delayed closing

In so far as the Tribunal can determine, there is no reported case dealing with a claim for compensation for delayed closing and no jurisprudence dealing with Section 19 of Regulation 726 under which this issue must be decided. Accordingly, the Tribunal will analyze at some length alternative arguments which can be made as to the interpretation which should be made of the various provisions of that section although, in this case, the monetary results flowing from different conclusions which might be reached may not be of very significant difference.

The provisions of Section 19 of this Regulation are of such importance to this decision that it is set it out in full here:

19-(1) Every vendor of a new home of a type referred to in subclause 1(d)(i) or (ii) of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

- (a) the date originally fixed for closing the purchase agreement, or
- (b) an extension referred to in clause 3(a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

(2) Subsection (1) does not apply to the period of delay in closing caused by a strike, fire, flood, act of God or civil insurrection.

(3) Subject to paragraph 5 of the Addendum referred to in paragraph 12 of Section 1 of Regulation 728, subsection (1) does not apply where,

- (a) the vendor extends the closing beyond the original closing date after giving written notice to the purchaser at least sixty-five days before the original closing date; or

(b) the vendor extends the closing for not more than fifteen days beyond the original closing date or beyond the extended closing date referred to in clause (a), after giving written notice to the purchaser at least thirty-five days before the original closing date or the extended closing date referred to in clause (a)

(4) Where a claim is made under subsection (1), compensation shall be calculated from the original closing date as extended under clause (3) (a) or (b).

The facts and the evidence in the case relevant to this issue are as follows.

The Agreement of Purchase and Sale of the premises from the builder to the Applicants was made on May 30, 1988 and fixed a date for closing for February 28, 1989. There were about 40 houses to be built in the subdivision. The evidence indicated that the builder experienced delays in getting certain municipal approvals and, by the time it was able to get construction under way, the schedule was "tight" to meet the closing dates for this house and others in the project.

By December 16, 1988, all that was built on the lot in question here, Lot 10, was the concrete foundation. Construction on a number of adjoining lots was much further on with wooden frames and other wooden parts of the houses up. On that date, a fire or fires was set by an arsonist which completely destroyed a number of these partially built homes and severely damaged others.

Tests showed that there was no damage to the concrete foundation on Lot 10, but there was damage to the building site in that it was soaked with water used to extinguish the adjoining fires making the ground unstable. There was a quantity of debris about and, of course, the progress of the whole project was set back by the time needed to clean up and put the project back in a condition where the work on building these houses could again proceed.

On January 9, 1989, the builder sent the solicitors for the Applicants a letter by way of a notice advising that, "Due to circumstances beyond its control it was forced to postpone the closing date to March 14, 1989". There was no mention of the fire and no reference to the provisions of subsection (2) of Section 19

in this letter, and it is a fair inference that in giving this notice, the builder was relying upon the provisions of subsection (3) rather than those of subsection (2) of Section 19.

This conclusion is corroborated by the fact that in giving evidence on this point, Mr. Ginsberg, a solicitor on the staff of the builder, indicated that in giving this notice, it had in mind the period of notice provision included in subsection (3). This notice, in fact, met the requirements set out thereunder and constituted an extension of the closing date within the meaning of clause (b) of subsection (1) of Section 19.

The house, in fact, was not finished on time for closing on this new date and on March 13, the vendor itself sent a letter to the Applicants's solicitors advising again that, "due to circumstances beyond its control it was forced to postpone the closing date to March 31, 1989. This letter was only received by the Applicants's solicitor on March 15. Again, there was no reference to the fire or effort to invoke the provisions of subsection (2) and again from the documentation and the evidence of Mr. Ginsberg as aforementioned, it is a fair inference that this notice again was an attempt to invoke the provision of subsection (3).

This notice given on March 13 and received on March 15 did not comply with the length of notice requirements of subsection (3) and, therefore, did not constitute an extension within the meaning of clause (b) of subsection (1) of Section 19. Therefore, if there had been no fire and we were not concerned with the application of subsection (2) of Section 19, it would have been simple to determine from the foregoing facts that the Applicants were entitled to compensation for delayed closing from March 14 until the date of closing. However, the evidence relevant to and the proper interpretation of subsection (2) must also be taken into account in deciding this case.

The first question to be determined under that subsection is a question of fact - namely, what was "the period of delay in closing caused by a...fire...". On this point, we have the evidence of Allan Brickman, a construction supervisor with special experience in cleaning up and getting projects under way after fires have occurred, and that of Mr. Ed Perryman, the Manager of the Toronto office of the Program.

Mr. Brickman was brought in by the builder immediately after the fire to supervise the clean-up and the getting of the project again under way for it. His evidence was that this took three to three and one-half to four weeks from the time of the fire. Since the work which he was supervising involved cleaning-

up and removing debris and damaged foundations, restoring stability to ground on which they would have to work which had been rendered unstable by water, and getting building operations back under way which involved both restoring or rebuilding items which had been destroyed, and proceeding with items of work which constituted new buildings; and since all of this work was intermingled, it was not possible for him to be more precise in stating the actual time required to perform his task and the Tribunal accepts that his estimate of three to four weeks for this purpose is as accurate as it can be put.

Mr. Ed Perryman gave evidence that he calculated the time of the delay caused by the fire to be 31 days.

In considering all of this evidence, the Tribunal considers it fair and reasonable to make a finding that the period of delay in closing caused by the fire was four weeks or 28 days.

The next question which arises is, in the circumstances of this case, from what date should the builder and the Program be entitled to add this period of 28 days in determining the date to which they are excused by subsection (2) from paying the compensation provided in subsection (1) of Section 19. It is the view of the Tribunal that the effect of subsection (2) is simply to suspend the operation of the rest of the Section for the period identified, in this case four weeks or 28 days. In essence, the warranty is suspended for this time period.

The fire occurred on December 16, 1988, at a time when the date for closing was fixed for February 28, 1989. It is the conclusion of the Tribunal, that in a case such as this in which the schedule for completion of the construction was "tight", and in which the builder had no more than enough time to meet the deadline if the fire had not occurred, the proper application of subsection (2) is to except or excuse the vendor from the operation of subsection (1) for 28 days from February 28 or until March 28, 1989.

Since this date is later than that to which the vendor had got a legal extension under subsection (3) as aforementioned, it is the operative date and commencing on the date of March 17, 1989 and thereafter, the vendor must pay compensation for the delay in closing.

The conclusion might well be different in a case in which the period of delay caused by the event mentioned in subsection (2) was of a duration relatively short in comparison with the amount of time which the builder had to meet his closing date then in place. The Tribunal appreciates that a builder of a subdivision

of a substantial number of houses, in this case 40, must reasonably allocate his forces for progress on many different houses. We must note that he has to do this in the light of the deadlines for the closing of each of his houses which deadlines, of course, he has been a party to putting in place.

This principle applies equally before and after the happening of an event mentioned in subsection (2). I point this out to state that it is the view of the Tribunal that a builder could not take undue advantage of subsection (2) to relieve itself of an obligation which it should have reasonably met even with the happening of the event which resulted in the delay contemplated in subsection (2). However, in this case, the builder was not in this position and the period of delay in closing, as found by the Tribunal, should be added to the date fixed for closing at the time in determining the period for which the builder and the Program is liable to pay compensation pursuant to subsection (1).

There is one other consideration with which we should deal although the result of giving effect to it would not be of great monetary significance. The conclusion which we have reached was based on a finding that the notice given on March 13, 1989 was ineffective. This was based on the conclusion that it was an attempt to get a further extension in accordance with the provisions of subsection (3). If one accepts the argument that on March 13 when this notice was given, the date for closing was actually extended to March 28 by reason of the operation of subsection (2) then, of course, precisely 15 days notice was given and this notice would be within the provision of clause (b) of subsection (1).

We have two reasons for rejecting this argument. In the first place, the notice was not received until March 15 and for the purpose of interpreting the notice periods, stipulated in subsection (3), it is the view of the Tribunal that these periods commenced to run when the notice is received and not when it is dated. In the second place, it is the view of the Tribunal as stated above, that the provisions of subsection (2) do not interfere with or amend the application of any of the provisions of the other subsections except that they excuse the builder and the Program for paying compensation for a period of the delay in closing a transaction caused by one of the events mentioned and that for all other purposes, the provisions of the other subsections have to be applied as set out.

The transaction, in fact, was closed on March 31, 1989 and the result of the foregoing is that the Applicants are entitled to compensation for delayed closing for 3 days from March 28 to 31.

Mr. Singh presented to the Tribunal, a list of the expenses to which he was put by reason of the delay in closing, and counsel for the Program did not seriously question these in cross-examination. The Tribunal, therefore, accepts his figures as the proper basis for the calculations to be made. In the first place, he had to move on March 14 to a temporary residence in Ajax and he paid rent there from March 14 to March 31 of \$750 or approximately \$41.66 a day, which for 3 days comes to a \$124.98. He rented a truck and moved most of the contents of his house to a friend's garage which was considerably less expensive than taking them to Ajax. He got the use of the garage free, but the truck cost him \$170. When he came to move everything to the new house on March 31 from the garage, it cost him \$256. He said that if he had been able to move everything in the first place from the old house to the new one, the truck rental would not have been more than \$120.00 as the distance was shorter. This gave him an additional cost by reason of having to make the two moves of \$306.

These costs were not related in any way to the length of the period for which he had to live in Ajax or to the length of the period for which the builder and the Program is required to pay him compensation and since the Tribunal has found that there was a delay in closing for which the builder is liable to the Applicants, we find that they should be entitled to recover this cost of \$306. The Applicants are also entitled to recover \$25 per day for incidental expenses without receipts or special itemizations thereof and they should be allowed \$75 for this heading.

These three items allowed, total \$505.98, and this is the amount which the Tribunal has concluded is payable to the Applicants.

Re: The issues of the vegetable spray faucet attachment and the laundry upper cabinets

In dealing with these issues, the Tribunal gets very considerable assistance from a recent decision of this Tribunal released on December 28, 1990 in the case of R. Sinson vs. Registrar of the Ontario New Home Warranty Program in which the appellant Sinson, who was a witness for the Applicants in this case, was pursuing claims for these same two items, as well as other items against the same builder upon identical documentation and almost identical evidence.

The only witness who gave evidence in this case on these issues, who did not give evidence before the Tribunal in the Sinson case, was the Applicant Lal Singh and his evidence was to the same effect as that of the others in that he said he had seen a vegetable spray attached to a hose in the sales trailer and that

he believed that the words "with vegetable spray faucet attached" in the first line under Item 3 on Schedule "A" of the Offer of Purchase and Sale being found at tab 1 of Exhibit 5 herein, indicated that he was getting this type of vegetable spray. He also said that he believed from the fact that he was asked to make a choice of colour to be filled in on the chart selection sheet (tab 2 of Exhibit 5) for "laundry uppers", and that the agent for the builder indicated to him he was to get these, although there was no other reference in any of the documentation constituting the contract to them, that he was to get such laundry uppers.

In its reasons for judgement in the Sinson case above mentioned, the Tribunal analyzed all of the relevant evidence at considerable length and reached the conclusion that it should not interfere with the decision of the Program to disallow these claims. For the same reasons outlined in that decision, the Tribunal concludes that Mr. Singh did receive the vegetable spray for which he bargained. The Tribunal puts the question and its answer thereto at page 11 of that judgement:

Did Mr. Sinson receive the vegetable spray to which he was entitled? The Tribunal believes that he did for the following reasons:

- 1) The device he received was attached to his kitchen faucet in the manner set out in Schedule "A";
- 2) The purpose of the device was to serve as a vegetable spray. This is clearly borne out by the package which Mr. Sinson brought to the Tribunal and which states that the aerator device may be used to spray vegetables, as well as by the testimony of Mr. Perryman of the New Home Warranty Program, who was shown a similar device when he asked for a vegetable spray.
- 3) The device which Mr. Sinson seeks does not resemble the one promised in Schedule "A" because it is a hose attachment to a pipe and, therefore, not attached to a faucet.

The Tribunal finds, therefore, that the builder did not make an illegal substitution, but rather provided the exact item promised. The New Home Warranty Program was, therefore, justified in refusing this claim by the Applicants.

Also for the reasons set out in that judgement, the Tribunal concludes that Mr. Singh was not entitled to laundry uppers at no extra cost. While Ms. Sirota who made whatever statements were made to the Applicants concerning these laundry uppers and who filled in the chart with the colour for them as aforementioned, was clearly the agent of the vendor for this purpose, we agree that in doing so, she made a mistake and adopt the language from page 12 of the judgement in the Sinson case:

Miss Sirota made a mistake, but such an error would not legally result in imposing an additional obligation on the vendor which he had not undertaken in the original sales documents. Since the documents of sale clearly show that the vendor was only to provide cupboards in the kitchen, he cannot be obliged to provide such cupboards in the laundry room solely because of an error by Miss Sirota in filling out a colour chart.

The purpose of the colour chart was surely not to indicate new items that the vendor was obliged to provide, but only to indicate the colour the purchaser desired for items to which he was entitled. To hold otherwise would be to unjustly enrich the Applicants at the expense of the vendor. This is not the intent of the New Home Warranties Plan Act. The Applicants were never entitled to receive laundry uppers and for this reason the New Home Warranty Program was justified in refusing this claim.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to pay to the Applicants the sum of \$505.98 by way of compensation for the delayed closing of the transaction and otherwise to disallow the Applicants' claims for a vegetable spray faucet attachment and laundry upper cabinets.

642551 ONTARIO INC.
(VICANO CUSTOM BUILT HOMES)

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
JOHN CORSI, Member

APPEARANCES: CAROL A. STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF HEARING: 31 October 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a Notice of Proposal set out in a letter from the Ontario New Home Warranty Program to the Applicant dated February 4, 1991, which was a Proposal to revoke the registration of the Applicant by reason of certain breaches of warranties and certain breach of terms and conditions of registration as set out therein.

When the matter came on for hearing before the Tribunal, the only party which appeared was the Ontario New Home Warranty Program represented by counsel. Counsel filed as an exhibit, a letter from the Program to the Applicant dated October 29, 1991, confirming a settlement of all the issues between the parties upon the bases that the Applicant will pay to the Program on or before November 30, 1991, the sum of \$2,500 whereupon the Registrar will not proceed with his Proposal. But also providing that, if the Applicant fails to pay this money within the time limited, the Registrar will carry out his Proposal and revoke the registration effective December 1, 1991.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program that:

1) In the event that the Applicant pays the aforesaid sum of \$2,500 to the Program on or before November 30, 1991, the Registrar shall not carry out his Proposal.

2) In the event that the Applicant does not pay the said sum within the time limited, the Registrar shall carry out his Proposal and revoke the registration of the Applicant effective December 1, 1991.

DESMOND E. SMITH and
BARBARA E. GUAY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
JAMES GRAY LESLIE, Vice-Chairman as Member
WILLIAM WATSON, Member

APPEARANCES:
DESMOND E. SMITH AND BARBARA E. GUAY,
appearing on their own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 7 November 1991 Ottawa

REASONS FOR DECISION AND ORDER

On March 6, 1989, Desmond E. Smith ("Smith") and Barbara E. Guay ("Guay") agreed to purchase from Woodlea Homes Inc., the model home in their subdivision at 3 Hyde Parkway in Nepean. They took possession of their new home on June 1, 1989; and the purchase price was \$277,000.00.

On May 25, 1990, they submitted a letter to New Home Warranty Program noting 18 items as being incomplete including:

2. Elevation of garage floor uneven and unacceptable finishing job.
3. Parging for a finish on the front step not acceptable.
7. Driveway and garage floor not even.
10. Joints in the kitchen counter top are uneven.

On a conciliation inspection on October 29, 1990, notice was taken that the garage floor had been replaced in June 1990.

Comments were made on Schedule "A(1)" for items 2 and 7 above as follows:

Complaint: ELEVATION OF GARAGE FLOOR UNEVEN AND UNACCEPTABLE FINISH

Observation: The builder had repaired the garage floor prior to inspection. As such, this is not a warrantable item.

However, the asphalt driveway was gouged and stained during the repair. The builder accepts responsibility for this damage. The builder has agreed to patch and seal the driveway.

Complaint: DRIVEWAY AND GARAGE FLOOR NOT EVEN

Observation: Although the garage floor was repaired by the builder prior to inspection, the asphalt driveway directly in front of the garage requires levelling to meet the floor finish.

The comments concerning item 10 also on Schedule "A(1)" as follows:

Complaint: JOINTS IN KITCHEN COUNTERTOP NOT EVEN

Observation: With respect to the mitre joint to the right of the kitchen sink, the seam waves up and down. Although the homeowner indicates that water has never penetrated this seam, it was not documented that the seam was not acceptable at the time of possession. Since it would be speculative to determine how and when this damage occurred, this item cannot be warranted.

Notwithstanding the above, the seam to the left of the sink has been installed noticeably off level, and requires repair. In addition, excessive glue deposits were noted in the mitred corners throughout the kitchen, which should be removed.

The seam to the left of the sink was repaired, but Smith and Guay continue their claim concerning the seam to the right of the sink.

The decision for item 3 above was made and placed on Schedule "A(2)" with the comment:

Complaint: PARGING FOR A FINISH ON FRONT STEPS NOT ACCEPTABLE

Observation: The top surface of the cement landing and tread have been covered with a cement coating to conceal damage which occurred prior to the concrete curing. The repair has already lasted through one winter season, and there is no indication of premature wear. The repair is viewed to be acceptable and not consistent with a defect in materials or workmanship.

Smith stated that a dumpster container had been placed in the driveway to receive broken garage cement flooring and when it was removed, deep gouges were left in the driveway surface. The driveway was dug up in June 1991 and a new black patch covers the upper right one-quarter of the area with a noticeable 1 1/2" dip and fraying edges. Also a one-foot wide trench was cut across the full garage entrance and a new black patch fills the space to even up the slope from the new garage door to the remainder of the driveway. The builder would now seal the whole driveway to blend in colour and finish. Smith rejects this as the large patch may not be of full depth, as the edges are fraying and as the slope of the join to the original driveway allows water to stand and would interfere with the use of a snow-blower in winter. Smith sees the appearance of his driveway as a "joke" in his neighbourhood and believes that sealing is now not enough. He wants the driveway all dug up and replaced at a cost of about \$1,750 plus taxes.

For the kitchen countertop, Smith stated that the right side of the 45 degree corner angle to the right of the sink had bubbled up and that no water was spilled there by him or by Guay. They had been in the house twice before purchasing and did not notice any problem with that seam. Repairs to the left seam have narrowed that difference to 1/32". Smith believes that the arborite or the frame may have been defective and questions why spilled water would affect only one side of the joint. He is not really content with the repair to the left seam and notes that another area of the counter is 1/2" higher than this counter. He and Guay would both prefer having a new full countertop put in with proper workmanship and no defects in material.

Smith submitted photographs of the driveway and of the front entrance. The two steps to the brick sidewalk show parging on the risers to be cracked and coming loose, while there is a

darker concrete resurfacing on the one tread and porch surface. Smith obtained an opinion letter from a consulting engineer firm which stated:

As requested the concrete stair and main entrance topping was examined at the above noted residence. The topping was visually examined and hammer sounded. Based on our observations, the following are our comments and recommendations.

The topping is noted to be delaminating from the face of the stair. Additionally hammer sounding of the top surface of the stair and porch indicated a number of delaminated areas which will scale off in the near future.

It is our opinion that the defects noted are as a result of improper surface preparation prior to application of the topping. Additionally it would appear that a simple sand cement parging grout was used which is not suited for surface application where freeze thaw cycling will occur.

We recommend that the topping in place be removed and replaced with a polymer modified concrete such as Sika Top - 123. The manufacturer's recommendations for surface preparation and application should be strictly adhered to.

Smith would have the surfaces repoured and was quoted a price of about \$580 for materials with labour costs extra. He said that these steps were to be replaced when the garage floor was replaced and Guay noted that without being consulted, they came home one evening to find the work done and the entrance blocked off with a length of board. They believe that the hollow areas will fill with water over the winter and that further expansion damage will crack and destroy the parging coat.

For the New Home Warranty Program, Heather Mayhew ("Mayhew") reviewed her Conciliation Report of October 10, 1990. She has been a conciliator for three years and was a construction employee for seven years earlier. She is a 1979 graduate of the Architectural Technology course at the University of Ottawa.

She visited the property this week to look at the driveway and finds the two patches acceptable with no subsidence and with a satisfactory appearance after a sealing coat is put over the whole driveway area. She sees no need to dig up and replace the whole driveway. Mayhew proposes that the problem with the right seam on the countertop is due to a water spill which seeped into the joint, but cannot warrant this complaint since no one can say when it happened. There is also a small 1" chip in the surface of the porch entry which, in her opinion, is today the same size as it was in October 1990.

A reinspection of the countertop and the front step was done on November 29, 1990 by her and by conciliator Philip Mayhew, who agreed with the decision she had reached.

The Tribunal has considered the evidence concerning the countertop situation and cannot conclude that there is a warrantable claim to replace the whole countertop area. There is here no proven defect in workmanship or materials and no evidence as to when this problem arose. Accordingly, we must direct the New Home Warranty Program to disallow this claim.

We find that the proposal to apply a coat of sealer over the present driveway is not a sufficient response to the owner's complaints. We direct that the New Home Warranty Plan have the large patched area cut out with a saw in an added sufficient area towards the street that will ensure that a replacement patch has a level connection with the existing driveway; and that then a coat of sealer be applied to the entire driveway.

We find that the two vertical risers of the entrance way are damaged and that this should be corrected. We direct that the New Home Warranty Program have a new surface coating properly applied to the horizontal and vertical surfaces of the steps and porch. We note that both the repairs to the driveway and to the entrance way would be under a further one year guarantee as is the usual practice of the New Home Warranty Program.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs that the New Home Warranty Program disallow the claim for the kitchen countertop and allow the claims for the driveway and the entrance way as detailed above.

JOHN STEWART

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES:
JOHN STEWART, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 9 October 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the homeowner from the decision of the Ontario New Home Warranty Program to the effect that the homeowner's complaints do not constitute major structural defects and those are the only claims which are warranted because of the failure of the homeowner to file a written complaint with the Program within one year of taking possession or to advance a claim for water penetration through the foundation wall within a period of two years from the date of possession.

The evidence upon which there was no dispute was that the homeowner took possession on October 15, 1987 and the first complaint to the Program was dated December 11, 1989 and received by the Program on December 18, 1989, more than two years after the original possession. The homeowner indicated that he had had discussions with the builder and it was only when such discussions failed to satisfy the homeowner that the homeowner made a complaint to the Program. Be that as it may, this Tribunal can only operate under the terms of the New Home Warranties Plan Act and, therefore, no relief can be given to the homeowner unless his claim comes within the definition of "major structural defect", defined in section 1(o) of Regulation 726 to the Act as follows:

- (o) "Major structural defect" means, for the purposes of clause 13(1)(b) of the Act,

any defect in workmanship or materials,

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended...

Essentially before this Tribunal, the homeowner complained of subsidence of the garage floor and of the basement floor, contending that such were caused by bad grading of the lot and resulting ponding of water outside the garage. He further contended that these faults were of a structural nature. In addition, he complained that the gas proofing of the garage had not been completed properly.

Little evidence was put forward with respect to the gas proofing of the garage because the Program acknowledged that the gas proofing had not been completed according to the Ontario Building Code and that this was a safety measure. In concluding argument, counsel for the Program conceded that this defect was, in fact, a structural defect and the Tribunal concurs that this is a major structural defect under the definition of subclause (ii) contained in the definition in the Regulation quoted above.

With respect to the other matters, however, evidence was adduced to show that the builder had replaced the garage floor completely, but the homeowner was complaining of cracks reoccurring. The Program's investigator admitted that there were some cracks occurring, but stated that these were of a minor nature. The concern with respect to the grading and the build-up of water was also addressed in the evidence before the Tribunal. The homeowner advised that the lot had been totally regraded twice; and three times, in addition, was partly graded. This occurred between October 1987 and throughout 1990. However, the homeowner advised the Tribunal that the grading has been stated to be satisfactory by the Municipal Township at this time. He also indicated that the ponding of which he had complained now seems to have diminished substantially.

The homeowner in his evidence maintained that the basement floor was falling away because of structural defects. He produced photographs which were examined by the Tribunal. The Program's evidence, however, indicated that these cracks were of a minor nature and observance of the photographs by the Tribunal

would seem to indicate that this was so. The Program in its evidence contended that the cracks occurring were simply the result of normal shrinkage and were not "major cracks in basement walls" as designated in examples of major structural defects contained in the Regulation.

The Program's inspector attended at the residence on three occasions: July 25, 1990; November 15, 1990; and September 20, 1991. He indicated that he did not observe changes from the first to the last inspection in the nature of the cracks.

The onus of proving major structural defects is upon the homeowner in his appeal to this Tribunal and the Tribunal is unable to find that this onus has been satisfactorily discharged by the homeowner.

It developed in the course of the evidence that the Program had offered to gas proof the garage and to repair the garage floor, or in the alternative provide the homeowner with a cash settlement. Having conceded that the gas proofing is a major structural defect, it is the view of this Tribunal that the Program must deal with the issue of the gas proofing of the garage. With respect to any repair or offer of settlement, the Tribunal having found that this item is not a major structural defect, it is entirely up to the Program to decide whether it is prepared gratuitously to effect any further repairs or make any cash settlement with the homeowner and no order will be made in this respect by the Tribunal.

With respect to the gas proofing of the garage, the Tribunal is very concerned that this is a matter which must be completed and the Tribunal is, therefore, not in favour of the Program making a cash settlement of this matter with the homeowner unless as a condition of the cash settlement, satisfactory evidence is provided to the Program of competent completion of the gas proofing of the garage.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal hereby confirms the decision of the Ontario New Home Warranty Program to disallow the claims of the Applicant with the exception of the gas proofing of the garage and directs the Program to complete the gas proofing of the garage.

MR. AND MRS. A. TALOSI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
LOUIS A. RICE, Member

APPEARANCES:

GARY LIVESEY, representing the Applicants

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 11 February 1991

Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Anton Talosi purchased a new home at 19 Twin Court, Hamilton taking possession on June 12, 1987.

Shortly thereafter, they complained to the builder and to the Ontario New Home Warranty Program of the state of the floors constituting the entrance, hallway, bathroom, laundry room and kitchen. The tile was acknowledged to be deficient by the builder and the Program and a new floor was installed on top of the old one, but this again was unsatisfactory both in colour and appearance.

Mrs. Talosi, in her evidence, said that the floor had a yellow appearance and again, it was acknowledged by the builder to be deficient. This was in July 1987.

Sometime before Christmas 1987, Britannia Tile Ltd. was brought into the picture to give an opinion on the floor. The recommendation was that a new floor be laid on top of the second one, and on April 9, 1988 that Company had completed the work. Mrs. Talosi in her evidence remarked that this floor looked very good and she had no complaints about it for a year. Early in 1989, however, she called the builder to complain about the staples coming up and eventually wrote to the Program in April 1990. This was the first complaint the Program had received from Mrs. Talosi since the floor had been laid two years before.

Mr. Talosi, a carpenter for many years, said he did not agree with them installing a third floor and now, very short staples were coming through. As a result, he obtained an estimate from Beverley Hills Aluminum to supply and install a new floor for \$7,500. This estimate is dated July 11, 1990, but a further estimate was requested from The Building Group which priced the complete installation at \$4,835.00.

A witness on behalf of the Program, one Tony Ferro said that J and B Construction had replaced the floor a month after possession, and admitted they did not do the work properly. As a result, Britannia Tile Ltd. was called in to install the third floor.

Louis Ferro, who owns Britannia Tile in his evidence said that the floor he saw was not of the best and recommended a new sub-floor and vinyl be laid on top. One-quarter inch plywood was accordingly installed with staples of one and one-quarter inches which locked in. Vinyl was then laid on top of the plywood and this was completed in April 1988.

Mr. Ferro said that the Talosis never spoke to him about the floor after the installation and was surprised to learn just a week ago that some of the staples were coming up. He observed that the staples could easily be driven down by placing a board over the area and hammering it. Dealing with the issue of the three floors, Mr. Ferro said he often recommended putting one floor on top of another, and that the floor was tight and not cushioned.

Mr. Robert Hart, Regional Manager of the Hamilton office, pointed out the original complaints had been filed within the year and had been dealt with accordingly. There was, however, no contact between the Talosis and the Program between April 1988 when the third floor was installed and April 1990. As a result, the following letter was written by Mr. Hart to the appellants:

May 31, 1990

Ref: #12-947 (42120)

Mr. and Mrs. Anton Talosi
19 Twin Court
Hamilton, Ontario

Dear Mr. and Mrs. Talosi:

We have received additional information from your builder confirming that the

repairs to your vinyl floor were completed in April 1988.

There is no evidence of any contact or complaint from you in the two years between April 1988 and now. For this reason we cannot take any action against your builder and we will be unable to hold the conciliation previously arranged for June 15.

We regret that unless you have any evidence to the contrary, we will be unable to assist you with this problem.

Yours truly

ONTARIO NEW HOME WARRANTY PROGRAM

W. Robert Hart
Regional Manager
WRH/ami

cc: Valery Construction Ltd.

There is no doubt that any complaint of a deficiency in this flooring falls within Section 13(1) of the Act since it is not a structural defect. The warranty under Section 13(1) is subject to the following provision under Section 13(4):

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

It is acknowledged that the complaints about the deficiencies in the first two floors were made within the one year limitation period, but it is clear that no complaint was made about the third floor until after a period of two years of its installation. At least for a year thereafter, Mrs. Talosi was pleased with the floor and there was no reason to complain. She said she called the builder in 1989 about the staples, but no notice was given either to the Program or to Britannia Tile Ltd. of her dissatisfaction.

It is clear that the Act in providing a warranty of one year against defective workmanship and material does not

contemplate the builder or the Program to be liable for an indefinite period thereafter. The evidence, which is irrefutable, can lead us to no other conclusion than that the complaint about the third floor was not made within the prescribed period after the work was completed and, therefore, the claim must fail.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to disallow the claim.

THE IONA CORPORATION

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
JAMES GRAY LESLIE, Member
D.H. MACFARLANE, member

APPEARANCES:
THOMAS A. KELLY, representing the Applicant Ltd.
CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 22 April 1991 Toronto

REASONS FOR DECISION AND ORDER

The Iona Corporation was registered as a Vendor/Builder on November 3, 1983. On February 14, 1990, renewal of registration was refused because of three outstanding claims for the "Ronan", "Fox", and "Tam" properties, in the total amount of \$14,418.25. In addition, an invoice was sent to the builder on December 20, 1990 claiming \$6,500, being an amount for 13 excess chargeable conciliations; no one of which is part of this hearing.

By a Notice of Proposal on February 5, 1991, the Ontario New Home Warranty Program formally proposed to refuse to renew the registration of the builder because of unpaid invoices for payments made with respect to five properties. The claim concerning the "Tam" property and the "Fox" property of the earlier letter are not before the Tribunal.

The four properties which are the items before the Tribunal today as are follows:

<u>Owner and Address</u>	<u>Date of Conciliation Report</u>	<u>Invoice#</u>	<u>Amount</u>	<u>Admin. Fee</u>	<u>Total</u>
Mr. and Mrs. C.Ronan 17 Underhill Cres. Aurora	21 Jan. 87	10325	9,120.00	1,368.00	10,488.00
		11093	2,460.00	369.00	2,829.00
		11952	175.00	26.25	201.25
Ms. D. Gowans and Mr. M. Wasylik 1480 Netherly Court Mississauga	25 Jan. 90	13593	2,754.00	413.10	3,167.10
Mr. and Mrs. L. Guidolin 23 Tamarac Trail Aurora	4 May 87	13925	432.58	100.00	532.58
		14105	7,200.00	1,080.00	8,280.00
Mr. G. Fellowes and Ms. Wendy Wain 243 Tamarac Trail Aurora	6 Sept. 90	14856	600.00	90.00	690.00
				Invoice reads	"\$960.00"

David Betts ("Betts") is a Senior Conciliator in the Newmarket office with 9 years experience and had earlier been in the construction industry for 20 years. Derek Finnerty ("Finnerty") is the manager of contracts for The Iona Corporation and has since 1986 worked for the builder in various capacities. These two men were the only witnesses called upon, and the Tribunal will summarize their evidence under each claim with our conclusions.

Ronan

The major item on this home was the complaint on the Iona 60-day warranty inspection that "brickwork on front of house not repaired or cleaned up". A letter was sent to the Program on August 7, 1986 repeating "concerns with the masonry job done on my house".

A request for conciliation led to the inspection of December 22, 1986 where an item for a cracked thermopane glass window unit was warranted but the concerns of the brickwork were not allowed

as to the mortar joint finish. The owners had a report prepared by a Teaching Master of Masonry at George Brown College, which led to a further proof of claim as to the unworkmanlike appearance of the brickwork on the front of the house; and Betts did a re-inspection.

As the brickwork concerns of the owner had broadened, that re-inspection was done with three staff members of the builder and the builder's architect present. Certain overall items were found to be unacceptable, namely mortar joint widths, the use of cut bricks, remortaring problems, unequal courses of bricks, splashes and smears, and the filling of some voids with mortar.

In his Field Inspection Report, Betts concluded as follows:

The design feature of a "struck" joint should not be considered under warranty.

In my estimation, and due to the number of warranted items to the brickwork at the front of the house; this would necessitate tearing down and then properly relaying the brickwork only to the front gable ends for both the house (main level) and the garage; reinstating the "struck" mortar joints. The entire brickwork at the front of the house should be professionally cleaned.

However, should the homeowner make his claim on the entire brickwork of this home, further remedial work would be justified. In light of this, it may be to the builder's best interest to satisfy the homeowner's complaint and redo the entire brickwork at the front of the house and garage with a tooled joint and properly cleaned.

In Bett's view, the Program was effecting a compromise by just proposing to have the front of the house rebricked; and a letter of decision was sent on November 17, 1987 which stated:

It is the decision of the Warranty Program that the areas are not reparable and must be re-bricked in a workmanlike manner with bricks of a same type and colour and free of defects as the rest of the home and in accordance with the Ontario Building Code. In the homeowner's interest, a fully tooled joint should be used.

Two estimates were obtained and the lower one of \$9,120.00 was accepted by the Program with any necessary driveway damages to be an extra item. A further letter went to the Builder on February 9, 1988; the work was done and an invoice was sent on June 14, 1988.

After the brickwork was completed, it was then necessary to have light fixtures and shutters installed on the front of the house, certain caulking was required around the doors and windows together with the replacement of some eavestroughing. As well it was necessary to paint window frames on the front elevation of the home and to supply and install a control button for the door chimes at the front door. These amounts were the total of \$2,460.00 as set out on the earlier invoice and there was then the cost of resealing the driveway which was an amount of \$175.00 as set out earlier.

In addition, the Program made a cash settlement of \$285.00 with respect to the broken window that had appeared in the initial conciliation report as a warranted item and which had not been repaired by the builder.

In Finnerty's opinion, the brickwork on the Ronan house was average for this subdivision and some brushing and cleaning was required. Tool joints were used for the 360 houses in the subdivision and there were no problems with the bricks themselves.

In his opinion, the builder is not responsible for these costs since this was a "A(2)" item initially and was later changed into an expensive obligation. Various complaints and warning letters were received by the builder, but the work was not done since the builder relied on the opinions in the first conciliation inspection report.

Counsel for the Program reminded the Tribunal that a general notice of a symptom or problem is enough to have the Program attend to an owner's concerns. Since in her view, the builder could have been required to rebrick the entire house, the builder really was saved a much greater expense. The costs as invoiced are reasonable and the cost of the broken window should be added in as well at the sum of \$285.00 plus an administration fee of \$42.75.

Counsel for the builder advanced the view that the initial concerns about the bricks were attended to and that any rebricking was an excessive repair where some power washing could have been enough. The second proof of claim was a new complaint, in his view, which was beyond the first year coverages.

The Tribunal finds that the Program succeeds in the claims for this property. The work done could have been properly completed when the second inspection occurred and the builder did not do so. We find that the builder is liable to pay to the Program the total sum of \$13,846.00 for the three invoices and for the broken window.

Guidolin

The builder accepts the two claims for work done on this property in the amounts of \$7,200.00 and \$432.58; but disputes the addition of the 15% administration fee of \$1,080.00 and \$100.00 respectively.

Betts acknowledged the co-operation of the builder and wrote on November 30, 1990:

In response to the letter from Mark Warsh to George Stinson dated November 13, 1990; it is agreed that you should not have been charged the administration fee when invoiced for our costs in regard to the remedial work carried out on your behalf at the above noted residence.

By faxed copy of this letter, I am requesting that our Enforcements Department remove the administration charges (Invoice #013925 and 014105).

New corrected invoices were not sent and the amount is outstanding today. Counsel for the Program seeks these costs now because of the necessity of having to prepare and proceed. She noted that corrected invoices are not usually prepared and that there was no confusion in the mind of the builder as to what should then be paid.

Finnerty said that a corrected invoice would have been paid and that their office practice was to pay when the proper invoice was received.

Since seven months have now gone by, the Tribunal finds that both the Program and the builder are equally to blame for this technical stand-off, and we order that the builder pay the sum of \$7,632.58 plus \$590.00 as an administration fee.

Fellowes

Here a basement water leak in the southwest corner was complained of on June 7, 1989, within two years of the taking of possession on September 30, 1987. Repairs were done to that area by the builder, but a further complaint was received on July 10, 1990 when there was a foundation crack in the southeast corner by the front door. The owner noted that the defects may have been the result of work done by the Town of Aurora in changing the driveway slope and that "Prior to this year the defects were not apparent".

Repairs were done and the builder received an invoice for \$600.00 plus an administration fee of \$90.00; which by typing error showed a total of \$960.

Betts was uncertain as to which location was correct for the second claim. Finnerty said that the work done had corrected the problem complained of originally and that the house had problems only after the Town of Aurora had this driveway work done. There was no evidence before the Tribunal that this claim is a major structural defect or that the basement is unusable.

On the evidence before us, the Tribunal cannot establish the liability of the builder in this claim; and the claim is disallowed.

Gowans

On August 15, 1988, Mr. Gowans raised a number of complaints about his new home, one of which was:

9. Ensuite - Master Bedroom - Tiles
 around jacuzzi are cracked as well
 as cracks in the shower at bottom
 below door.

Repairs were done, but were not found to be good enough by the owners. Betts did a conciliation inspection on January 16, 1990 with Mark Warsh representing the builder. The complaint observation and comment as noted on Schedule "A(1)" are as follows:

1. COMPLAINT: Ensuite bathroom was repaired - not satisfactorily.

OBSERVATION: The owner referred to the previous repairs to the ensuite shower stall ceramic tile and caulking. Inspection of the interior of the stall revealed various areas where the tile were raised, uneven in installation, and loose. There was also areas of excessive white caulking at the corners and floor areas, as well as around the fixtures.

COMMENT: The builder is requested to repair all raised tiles on the interior shower stall walls, secure loose tile, remove and recaulk in a good workmanlike manner all necessary areas including shower fixtures.

When repair work was not completed by the builder, the Program proceeded to have substantial repairs done in the amount of \$2,754.00 and sent an invoice for that amount, together with a 15% administration charge of \$413.10; for a total of \$3,167.10.

Photographs were presented to the Tribunal by Betts to show some unevenness of tiles in the rear wall of the shower stall and a possible bow in that wall. Betts did not inspect this project which had been done by another conciliator who was unavailable for the hearing.

Finnerty stated that he had inspected this home and saw cracks in the tiles under the marble bar top on the inside of the shower. Nothing was complained of as to the walls or floor of the shower installation. In his view, there was no connection between the matter complained of and the further complaint which was well outside of the one year warranty.

As there is no clear evidence before the Tribunal of a connection between the repair work done and the original small complaint made, the Tribunal has decided to disallow this claim as against the builder.

There was no evidence brought before the Tribunal with respect to the claim made for \$6,500.00 referred to earlier. Accordingly, by virtue of the authority vested in it under Section 9 (4) of the Ontario New Home Warranties Plan Act, the Tribunal orders:

- a) that the Registrar refrain from carrying out at this time his Proposal to refuse to renew the registration of The Iona Corporation, and
- b) that The Iona Corporation pay within 20 days to the Ontario New Home Warranty Program the sum of \$13,846.00 with respect to the Ronan claim and the sum of \$8,222.58 with respect to the Guidolin claim; and if The Iona Corporation fails to make the payments as aforesaid, the registration of The Iona Corporation may be revoked forthwith by the Program without any further notice.

MR. AND MRS. MICHAEL TOCZKO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
LUCIENNE BUSHNELL, Member
WILLIAM WATSON, Member

APPEARANCES:
MICHAEL TOCZKO, appearing on their behalf
STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 22 July 1991 Ottawa

REASONS FOR DECISION AND ORDER

On June 30, 1989 Helen and Michael Toczko agreed with Great Gulf Homes Limited to purchase a house to be constructed at 59 Allenby Road, Kanata. The building is cited as Model MG35B for Lot 189 on the plan of subdivision and completion was to be by January 26, 1990; with closing earlier if possible.

Three particular items in the Schedule attached to the Agreement of Purchase and Sale are of interest in this claim. They are:

38. Exterior of homes are to be constructed in Vinyl or Aluminum Siding and brick as per Vendor's plans and specifications. Brick to be clay or calcite at Vendor's option. Construction below first floor elevation shall be poured concrete or concrete block at the option of the Vendor.
45. All exterior finishes and colors are selected by the Vendor and are subject to architectural control.
52. It is understood and agreed that the following represents all of the items of construction and finishing for which the Purchaser is entitled to make selections:

- a) materials, including choice of color of materials, for floor and wall finishes, as described in paragraph 4 above.
- b) color of paint, as described in paragraph 5 above.
- c) color of brick for fireplace, as described in paragraph 34 above.
- d) kitchen cabinets, as described in paragraph 10 above.
- e) counter tops, as described in paragraph 11 above.
- f) color of ceramic tile, as described in paragraph 13 above.
- g) color of ceramic tile, color of bathtub and color of bathroom fixtures, as described in paragraph 6 above.
- h) style of vanity, as described in paragraph 8 above.
- i) color of broadloom, as described in paragraph 14 above.
- j) materials, including choice of color of materials, for floor finish, as described in paragraph 12 above.

Michael Toczko ("Toczko") presented the claim for the appellants. He spoke of visiting a model home in the subdivision and finding its color scheme pleasing. Christine Zimmerly, the sales representative, said this model was the builder's color code "9" of 13 choices. The front facade of the model had pink brick with white siding and trim; and with a red shingle roof although on the builder's chart, the details of "9" call for a brown roof. Since architectural control is rather strictly followed in Kanata, the Toczko's choice of color was apparently possible as long as the neighbouring homes would not be similar and the general mixing of colors on their street would not be upset.

He said that on July 19, Christine Zimmerly repeated the earlier comments on brick color and these were reviewed with Elaine Spratt, who was the builder's co-ordinator for color and finish choices. A Memo was sent by her to Ken Nightingale on July 26 requesting the color change from the listed "4" of brown brick and almond siding and trim. At that time, the Toczko's were told that a red roof was not available and they agreed to accept a brown roof if on a further enquiry, it had to be that way.

Lists of Optional Extras with prices were signed on July 27 by the Toczkos and Elaine Spratt and accepted on August 4 by

Ken Nightingale. No reference to brick or roof color was made Toczko said, since again Elaine Spratt repeated for a third time the previous prospect of availability subject to the controls.

Since Ken Nightingale had initialled the "9" color package request on the memo and completed the other six items in that memo eventually, Toczko believes that the eventual failure of the builder to use pink brick is a breach of the Agreement of Purchase and Sale contract as it had been agreed to.

In early September, the Toczkos visited their lot to watch progress in construction. Helen was newly pregnant and the prospect of a baby in their dream home was a great joy to both of them. On September 27, a visit to their home caused them to be "horror struck", he said, in that the brown brick of the "4" package original as signed to that lot was more than half constructed. The Toczkos called their lawyer and then they called Christine Zimmerly forthwith who, upon meeting with them the next day, showed her color records to have a "9" for this house which change was also written into Ken Nightingale's book. Apparently, the architects had not been informed and approval not obtained so the site foreman had gone ahead with the original package for the lot.

The Toczkos chose not to cancel their contract as they liked the level 40 foot wide lot and the price for a good sized home which was possible for them. Prices in the Ottawa area were in the \$200,000 range for a 2,000 square foot home and here 2,760 square feet of area was available in the \$190,000 range. The siding and trim was changed in time from the almond of "4" to the white of "9", so the color of the home became somewhat lighter.

Since the brick color is not to their liking and replacement would cost some \$13,000 with possible damage to their home, the Toczkos seek compensation for their damages and would accept a heat pump, air cleaner, a second sink in the ensuite bathroom and some basement drywalling; all of which may be of a value of about one-half of the rebrickng cost. Their suggested compensation items or an alternative of just the heat pump and the air cleaner were rejected by the builder based on paragraph 45 of Schedule "A" referred to earlier.

Upon taking possession of their home on November 17, 1989, the usual Certificate of Completion and Possession had been signed by the Toczkos. A four page letter of deficiencies in the home was received by the New Home Warranty Program on January 2, 1990, but the matter of the brickwork was not referred to. On January 21, 1990, the story of the brickwork as set out in Toczko's own evidence here today was repeated to the Program; along with a

3-page list of further items. Many of the various items have been otherwise resolved.

On cross-examination, Toczko had paragraphs 38 and 45 of the Schedule to the Agreement reviewed, but stated that on Christine Zimmerly's word, he understood that there was no problem in changing the color scheme from the "4" which was assigned to that lot. He agreed that the brick color is not one of the selections in paragraph 52 of that Schedule; but again repeated his understanding from both Christine Zimmerly and Elaine Spratt that there would be no problem in changing the color, which the internal memo initialled by Ken accepted just as the other six items in that memo, in fact, were included and attended to in the project.

Ken Nightingale gave evidence on behalf of the New Home Warranty Program. He is the General Manager of Great Gulf Homes and for 12 years has done pricing and reviewed offers and signed documents. With 1,400 lots in the Kanata area, the builder constructed about 150 homes in 1989 using a variety of plans for 30', 40' and 50' wide lots. An architect supervises the "palette" of colors for the mix of homes along the various streets.

Real Estate agents are on duty and a decoration centre shows the variety of choices for color, tiling, carpets and other trim. All models would not fit on all lots, he said, and the Toczko's choice needed a 40' lot. Red shingles were no longer available in June 1989, although the panel in the decor centre was apparently not changed. The model home had been built in 1987 when those shingles were available. In his opinion, the optional items must all be specifically referred to in the signed Agreement in order to bind the builder to changes; and the brick change was not included and, therefore, cannot be demanded of the builder who, in fact, used the color of brick planned for that lot. He said that with so many homes being under construction by the builder at the time, his approval of the "9" change in the memo would only come to his attention if it became part of the optional extras agreement, since the buyers may have changed their minds or not bothered to see through the suggested change to completion.

Nightingale stated that if the item was in the optional extras list and was not done, the builder would be liable. Further, that the style of the house to be built on lot 189 was not the guiding factor in that color package "4" had been assigned to the lot.

Perry J. Harkin is a conciliator with the Ottawa office of the New Home Warranty Program. He attend on the conciliation about the brick color on June 21, 1990, when Ken Nightingale was also present. The Report reads:

Complaint: EXTERIOR BRICK PACKAGE

Observation:

The homeowner explained that he had requested a pink brick color and that brown was installed by mistake and contrary to his request. His request is in the form of a standard memo along with six other changes requested. There is no wording requesting these changes on this form, nor is there any formal signature to indicate agreement by all parties. The signed "Optional Extras" form includes all the changes from the memo except the brick color. Additionally, at the top of the form there is a descriptive paragraph regarding the form, its use and validity. To summarize, no change would take place without written approval and if approved changes were not executed, the purchaser would be entitled to a refund.

With respect to the Act, significant changes, i.e. brick color, made without the homeowners consent may be sufficient for the purchasers to terminate the agreement. In this case, there is no approved brick color, nor does the signed agreement specify a color package.

The complaint that the brick color was changed without consent cannot be warranted, because there is no breach of contract.

Harkin stated that he based his decision on a lack of documentation that would otherwise allow the change. The quality of the brick construction and the workmanship were not in issue, he said. As he lives in Kanata, he knows that permission is needed even to change the color of paint trim on a house.

In his decision letter of August 20, 1990, Harkin wrote:

Brick color package not as agreed

There is no document signed, witnessed and agreed to by all parties which specifies

a particular color package or a change in color package for the home.

Additionally, in paragraph 45 of Schedule "A" forming part of the Agreement of Purchase and Sale, signed by all parties, the vendor states that, "All exterior finishes and colors are selected by the vendor and are subject to Architectural control".

As there is no evidence of a signed agreement as to the color package, the claim that the builder did not give the brick color as agreed must be disallowed.

In conclusion, Michael Toczko noted that he and his wife wanted a home in the choices of the model and accepted a brown roof as a necessary change. The brick color, as built, is not their choice and they complained while the bricks were only part way constructed on the house.

Counsel for the Program saw no breach of any warranty in Section 13 of the Ontario New Home Warranties Plan Act. The items of choice and selection are listed in the Agreement Schedule at paragraph 52 and he noted that brick and exterior color are not included. Even if there was in some way a substitution which is not admitted, there was no damage since the warranty under Section 21 of Regulation 726 is for an item of equal or better quality, and that issue does not arise here.

He stated that since the builder here had absolute architectural control and the change as requested was not fully confirmed in the Optional Extras Lists, the builder has no obligation and the New Home Warranty Program is correct in denying the claim. In addition, a claim of \$5,600 based on certain extras which could be acceptable as compensation or based on a heading of grief or stress is not within the Tribunal's power to direct payment.

On consideration of the evidence, the Tribunal must find that there has been no breach of any part of Section 13. The change of brick color could have been included in the Optional Extras document and it is unfortunate that the Toczkos did not have that done to bind the builder to an agreed change.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act directs the New Home Warranty Program to disallow the claim.

PATRICK AND HELENE TRAYLING

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
JAMES GRAY LESLIE, Vice-Chairman as Member
WILLIAM WATSON, Member

APPEARANCES:

PATRICK AND HELENE TRAYLING, appearing on
their own behalf

STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 21 November 1991

Ottawa

REASONS FOR DECISION AND ORDER

This is the decision of the Tribunal in the matter of Patrick John Trayling and Helene Mary Trayling and the decision of the Ontario New Home Warranty Program to disallow their claim. The claim in this matter arose out of a purchase of a home by Mr. and Mrs. Trayling from Great Gulf Homes Limited in the Regional Municipality of Ottawa-Carleton. The purchase was scheduled to close on August 31, 1989, and did so. Complaints were filed with the Warranty Program in June 1990 within the first year of possession. A number of issues were raised and the evidence is clear that the Program and builder complied with many of the complaints and in at least one instance cash settled with the owners with respect to the kitchen floor.

Notwithstanding the foregoing, there were nine items remaining upon which the Traylings appealed to the Tribunal. At the hearing, the eighth claim with respect to sodding was acknowledged by the Traylings to have been satisfied so that, in fact, there now remained eight claims to be reviewed.

The first claim was with respect to the levelling of the kitchen floor in the breakfast room area. It was acknowledged that the whole kitchen, including the breakfast room area, had been a problem and evidence was given that three floors were laid in the

general area and eventually a cash settlement was given to the Traylings. Mr. and Mrs. Trayling acknowledged that the kitchen area had now been satisfactorily completed, but still objected to the breakfast room area. In particular, they complained about a discrepancy in the level of the floor totalling $3/4$ " maximum. The witnesses for the Program indicated that the problem was not noticeable except when drawn to the attention of someone and even then in the view of the witnesses for the Program, the level was within acceptable tolerances. The Tribunal is of the view that this claim should not be allowed.

The second claim was with respect to levelling of the floor in the hallway. This area is carpeted and again the witnesses for the Program indicated that unless it was drawn to your attention, the variation in level was even less noticeable because it was carpeted and accordingly, the Tribunal disallows this claim as well.

The third claim was with respect to cable and telephone outlets. The Applicants complained about the fact that they had attended at the designer offices of the vendor for the purpose of exercising rights to certain options and upgrades. While there, they were also shown plans of the house and were told, according to their evidence, that they could determine where their cable and telephone outlets were to be located. Attached to the option agreement was a schedule which a witness for the builder acknowledged was in the handwriting of an employee of the vendor showing clearly the location for cable and t.v. outlets.

A representative of the builder asserted the position that because the option agreement was signed but the schedule was not, nor was it initialled, that the vendor was not obligated to follow the installation locations identified on the schedule. The Tribunal finds this totally unacceptable. The option agreement specifically makes reference to a schedule attached, the uncontroverted evidence by both the Applicants and the builder representative was that the handwriting on the attachment was that of an employee or agent of the builder and the Tribunal finds it spurious for the builder now to say that because there are no initials or signatures on the schedule, the builder is not obligated to effect the installation.

There is no question that the document was prepared by a representative of the builder and if the builder were to insist that initials be placed on such document, it was incumbent upon the builder to have informed the purchasers and ensured that such was complied with.

Reference was made to a purchaser from this builder in

a previous decision of this Tribunal, but the Tribunal is aware of the fact that in that instance the option agreement was not signed at all. In this case, the option agreement has clearly been signed and makes reference to an attachment. Under the circumstances, therefore, the Tribunal is prepared to allow this claim on the basis of a substitution not authorized by the purchasers.

The Tribunal is of the view, however, that the problem can be rectified in a reasonably simple manner by running wires and cables underneath the baseboards rather than having to go through the main structure of the building.

The fourth claim was with respect to a draft in the family room. In this regard, it was to be noted that this was a sunken room and that might, therefore, cause some of the problem. The Traylings indicated that on cold windy days, there was a considerable draft. The Program representatives acknowledged that they had attended on several occasions to examine the draft and could not ascertain any significant draft or breach of warranty. The Program representatives did acknowledge, however, that on the occasion upon which they last attended, it was a sunny winter day with virtually no wind. The Program also in one of its letters to Mr. and Mrs. Trayling asserted that they were prepared to re-attend on a day when weather conditions caused the problem to manifest itself. The Traylings indicated before the Tribunal that what they would like at this time is a further attendance on such a day and that they would abide by the decision of the Program as to whether there was a warrantable claim in regard to this item.

It is the view of the Tribunal that the Program should in these circumstances attend once more under proper weather conditions and, if necessary, take appropriate measures to correct the problem in the sole discretion of the Program in the event that the Program determines that remedial measures are required.

The fifth claim raised by the Traylings was with respect to the location of the gas metre distant from the furnace and the location of the gas pipeline in the basement area of the house. The problem identified by the Traylings in this regard was that this was caused by siting the house in the reverse manner from that shown in the drawings attached to the purchase agreement. In particular, the Traylings complained about the fact that the gas pipeline under the family room area which, as noted, is a sunken area extended a few inches below the beams in the basement. Mr. Trayling indicated that in refinishing the basement, he would have a great deal of difficulty in putting in a ceiling which would be very low in that area. It also is to be noted that when the lines pass beyond the sunken family room area, the line has been placed between joists.

The evidence of the Program was that there was no defect in workmanship or material in respect to this installation and there are no specific guidelines for installing a gas pipeline in the basement area. Under the circumstances, the Tribunal finds that this is not a warrantable claim.

The sixth item complained of was with respect to a fireplace which was an upgrade by the purchasers. The fireplace was to be upgraded to have a black marble surround and a black marble hearth level with the carpet. The fireplace itself was to be black. According to the evidence of the Traylings, the builder damaged the fireplace and put brass around the outside of the marble. The Traylings indicated that aesthetically they did not find this as pleasing even though there was some brass on the doors of the fireplace previously. The Program's inspectors indicated that they found no defect in workmanship or material and that aesthetically there was nothing unpleasant about the installation. The Tribunal finds that this is not a warrantable claim.

The seventh claim was with respect to the replacement of the original marble in the ensuite bathroom shower with corian, a synthetic but much more durable material. Evidence was given that the marble was cracked in the installation and that the builder replaced it with corian of approximately the same colour, but in the view of the builder with a much more expensive and more durable product. Evidence was also given that there was a very small amount visible outside the shower area. From the photographic evidence submitted by the Applicant, it appeared evident that there was no substantial visibility of this area. In the view of the Tribunal, this is an acceptable substitution of a better quality product and, therefore, is not subject to warranty.

The final claim was with respect to what was characterized as the reversing of the plan. The Applicants complained that the plan which was attached to their Agreement of Purchase and Sale was reversed in installation. In looking at the Agreement of Purchase and Sale, on the first page in the top right hand corner, the model was identified together with the words "and/or reverse plan from brochure". No change was made in the Agreement, no reference was made to the specific location of the plan and, in fact, the purchasers saw the house being erected and closed the transaction without registering a formal complaint with respect to the reverse plan.

The basis of the Applicants' claim appears to be that one of their neighbours was given \$1,000 by the builder for the installation of a reverse plan. The evidence submitted to the Tribunal, however, indicated that this \$1,000 was given in the way

of upgrades and was negotiated between the solicitor for the other purchaser and the vendor prior to the closing. There was no evidence otherwise submitted to the Tribunal to indicate what might have been the circumstances regarding the other purchaser's agreement with the builder to receive \$1,000 in optional upgrades. Under these circumstances, the Tribunal is of the view that the purchasers did not so stipulate a requirement for the plan to be followed in exact form and, in fact, before the Tribunal could not indicate any damage which they had sustained other than perhaps the lighting was somewhat different from what they had anticipated. Be that as it may, no formal complaint was raised at the time of closing or during the course of construction when evidence indicated that had they made such a complaint, they could have been offered an alternative location with a house sited in the manner which they now claim was important to them. The Tribunal is of the view that this is not a warrantable claim in spite of the wording contained in the brochure issued by the Program to the effect that a reverse plan may very well permit a purchaser to void the deal or obtain some monetary compensation.

Accordingly, pursuant to the authority vested in the Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal hereby directs the Ontario New Home Warranty Program to have the telephone and cable installations completed in the approximate locations indicated in the schedule attached to the option agreement in the most economical manner possible in accordance with maintenance of reasonable aesthetics and the Tribunal further directs the Program to attend to inspect the draft in the family room when weather conditions are appropriate and in the Program's sole discretion to determine whether remedial work is required and, if so, to determine the nature thereof and effect such repairs. In all other respects, the Tribunal directs the Program to disallow the claims of the Applicants.

MR. AND MRS. BRIAN VAN SICKLE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:
JOHN KUKURIN, representing the Applicants
STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 9 October 1991 Timmins

REASONS FOR DECISION AND ORDER

On April 28, 1988 Brian and Carol Van Sickle entered into a contract with Northern Superior Homes to have a house built on their lot in South Porcupine. The price was \$103,600 to be paid to the builder in three advances with \$1,000 deposit accompanying the offer.

Immediately thereafter, however, they entered into an amendment to the contract deleting the purchase price and substituting cost plus 10% payable to the solicitors for the contractor. The price may have been estimated by the parties, but clearly the final amount to be paid was unknown by each of the parties.

The Van Sickle obtained a mortgage from the Scotia Mortgage Corporation in the sum of \$95,000 which was registered on title on July 7, 1988. It is to be noted that Van Sickle was an employee of the builder and engaged in the building trade and as a result dealt with the subtrades and suppliers for the construction of his own house as well as those of others.

Apparently after receiving some funds from the mortgage company, the solicitor for Van Sickle paid to the builder's solicitor on July 28, 1988 the sum of \$31,908 being the first advance under the contract and a further \$20,250 on September 16,

1988 constituting the second advance. These payments left a final advance under the mortgage of \$42,842. This advance, however, was not made by the mortgage company because the builder left the job in October and the work had not been completed. The mortgagee in assessing the work at that time concluded the house was only 80% complete and refused to advance further funds.

In the meantime and thereafter, Van Sickle had employed certain subtrades to work on the house paying them a total of \$12,325. One of these was a contractor who installed the foundation to whom he paid the sum of \$2,200. Mrs. Van Sickle appears also to have done some work charging her labour costs at \$3,650.

We conclude, therefore, that Van Sickle and the mortgage company had contributed a total of \$69,133 to the construction of the house which was then 80% complete. Since this was a contract on a cost plus basis, it is impossible to determine exactly what the remaining 20% cost would be but Mr. Blacklock for the Program estimated a further \$3,500, together with \$8,500 for kitchen cupboards and \$3,000 for trim and baseboard. Since these figures were not challenged, we may take them as being substantially correct and the total cost of the house would come out at \$84,133. This price was well below the original contract price of \$103,600 and over \$10,000 below the mortgage.

Mr. Blacklock's appraisal of 80% completion is in accord with that of the mortgagee and his estimate of the remaining cost is based on the list of uncompleted items entered as Exhibit 8.

The builder after leaving the job refused to return but issued a claim in the Supreme Court under the Construction Lien Act for \$51,442, the amount he alleged he had expended on a cost plus basis over and above the \$53,158 he had already been paid. Van Sickle issued a counterclaim and in the meantime, other lien claimants appeared; one of which was the Feldman Timber Company claiming \$36,950.55 for materials delivered to the property. Whether or not this material was delivered in toto to the property is a matter between the contractor and the owner and not an issue in which the Program is involved.

Mr. Dennis Faubert in his decision dated the 25 April 1990 on behalf of the Program advised Mr. Van Sickle that the Program had no alternative but to disallow the claim. We quote from his decision:

Having reviewed the matter and in consideration of the Ontario New Home Warranties Plan Act and regulations, and the information supplied

to date, it is the Program's decision that a breach of warranty does not exist and that no payment can be made.

Our reasons for this decision are as follows:

- A. In order, for the claim to be successful under Section 14(1) of the Act, the claimant must show a financial loss.

Section 14(1)(a) reads:

Where a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract...the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Section 14(2) reads:

In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

In order to obtain a financial loss the work and material in place would have to be less than the amount paid. However there is a cost plus addendum to the contract, therefore under normal circumstances payments are made based on itemized lists of material and labour. It follows the cheque submissions to the contractor's lawyer should have been calculated in this manner. Since the calculations must be done after the work and materials are in place it follows that there can be no financial loss.

- B. In order for the claim to be successful under Section 6(7) of Regulation 726, the claimant must show a financial loss due to the cost of completing the home.

Section 6(7) of Regulation 726 reads:

Liability in respect of the cost of completion of a home is limited to 2 percent of the sale price of the home or \$5,000 whichever is the greater.

However the cost plus addendum to the contract would indicate that all work in place would be represented by the payouts already made to the contractor's solicitor. Therefore the costs of completing the home have yet to be born by the claimant.

We are in agreement with this decision. There is no evidence before us of financial loss incurred by the appellants. On the contrary, it appears they will be able to complete the house well under the price estimated by the contractor. There are no figures before us that can lead us to any other conclusion. On this basis, therefore, the claim must fail. We might add, however, that there is no claim before us in a liquidated amount for consideration.

It is contended by counsel for the Van Sickles that although the house was not enroled in the Ontario New Home Warranty Plan, it was covered nevertheless because the builder was registered. Counsel for the Program argues that the contractor does not fall within the definition of a builder under the Act. In our view, it is unnecessary for us to make any decision on this issue. The evidence before us is conflicting and inconclusive. On the one hand we have the contract which even as amended would appear to bring the contractor within the definition of a builder, while on the other hand, there is the contractor's statement to the Program that he did not enrol the house in the Plan because he had agreed under the amended contract simply to construct the house while the owner would supply all the materials. This issue, however, is immaterial to our decision.

Since there is no evidence before us of any damages incurred by the appellants, we accordingly disallow the claim.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

DOMINIC A. VENDITTI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
LUCIENNE BUSHNELL, Member
JOHN CORSI, Member

APPEARANCES:
D.A. VENDITTI, appearing on his own behalf

STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 25 July 1991 Ottawa

REASONS FOR DECISION AND ORDER

On July 27, 1987, Domenic and Yvette Venditti purchased their new home at 1122 Rideau Bend Crescent, Township of Osgoode, from Deran Homes Inc. The registration of the builder has since been revoked. A conciliation inspection took place on October 17, 1988, and a report was issued on November 22, 1988. There were 16 items in Schedule "A(1)" and 15 items on Schedule "A(2)". Three of the outstanding items in the New Home Warranty Program decision letter of September 5, 1990, have not been resolved. As set out in that letter, the concerns and the position of Program are as follows:

- 3) "Replaced ceramic tiles hallway -- mismatched,
2 more cracked again, so far".

The Warranty Program will replace any tiles which crack further, however this will only be attended to after the remedial work to the foundation has been attended to. As for the difference in shading of the replacement ceramic floor tile, the difference is acceptable and only slightly noticeable with dim lighting. No difference was visible under natural light. It is therefore the Warranty Program's

decision that the replacement is acceptable.

- 6) **"Intercom modules, not yet provided by builder as promised"**

The only reference made in the Agreement of Purchase and Sale in respect to an intercom system, is for the system to be roughed-in, which it has. This is therefore not a contractual omission, no reference is made as to make or model in the agreement it is therefore the Warranty Program's decision to disallow this claim.

- 8) **"Heat pump - full vs. partial retrofit costs"**

From the onset, the Warranty Program has warranted this complaint, however, the Warranty Program's mandate is to ensure that the minimum Ontario Building Code requirements are met. The Warranty Program does not deny the original heat pump to have been undersized, however when properly operating and in conjunction with the installed plenum heater the minimum Ontario Building Code requirements were met.

As such, the Warranty Program cash settled with the owner to have a 'partial retrofit' attended to which the homeowners accepted on condition an additional appeal be allowed. The owner has always contended that a full replacement was necessary. Therefore the claim for an additional \$1,500.00. It is the Warranty Program's decision to disallow this claim as a full retrofit was not required.

The front staircase in the home arises from the centre of the front hall, with a passage on both sides and with two bannisters. Mr. Venditti reported that some 30 of the 1-foot square floor tiles had cracked along the joints of the 4-foot x 8-foot plywood panel subfloor by movement of the house, and that six of the replaced tiles have cracked again. The basement of the home had been rebuilt at a cost of some \$80,000 and no further shifting of the foundation is now thought likely. While the position of the Program is to now replace cracked tiles with the best colour match

possible from differing dye lots, Venditti wants all the floor tiles taken up, the sub-floor replaced if necessary and new tiles put down. In his view, tile replacement has caused bands of slightly different coloured tile to make the replacements obvious and unsightly. Further replacements will add to the appearance problem as tiles may continue to crack in future years and dye-lot differences will become even more pronounced. He noted that the replacements had been very well done with grout matched. but that the cracking of replaced tiles was a concern.

On cross-examination, he agreed that these tiles were the only ceramics in the home and that when laid out on a bright day by the contractor, the tiles appeared to match. However, under electric light in the evening, the bands of colour in the replaced tiles become apparent to him and the appearance of the hallway is not pleasing to him and to Mrs. Venditti. Since the contractor has a stock of these tiles on hand, the mismatched burden of a third dye lot in future has apparently been resolved.

On behalf of the Program, Paul Picard, the conciliator in this home, agreed that the cracks in 22 to 30 tiles had been caused by shrinkage of flooring and that the builder had been instructed to replace them. The colour variance in the ceramics is acceptable to Picard, and the work done on replacement was very good.

The Tribunal has often had to consider the matter of replacement of floor tiles and the problems which dye-lot differences make in the appearance of a floor. Venditti knows that there may continue to be cracked tiles. We find that these large tiles will likely crack again in the future. The grout is well-matched and the hairline cracks may repeat. We order that these cracked tiles be replaced, realizing that a slight background colour difference will occur within a range which is acceptable for a natural product. We cannot order the replacement of the entire ceramic floor in this claim.

Concerning the missing intercom modules, Venditti gave evidence that the subcontractor/installer brought the items for installation when the builder stopped this and said that they were an extra at a cost of \$1,149.49. As set out in Schedule "B" of the Agreement of Purchase and Sale of July 22, 1987, the following appears:

ROUGH-IN: (Up to and including wall recepticals)

Rough-in for dishwasher. Rough -in central vacuum system. (Vacuum tank in garage),

Rough-in central vacuum system. Rough-in Security system. Rough-in intercom system. Rough-in telephone wiring (all rooms)

On p.2 of Schedule "B" to the Agreement is noted the following:

Systems (to and including all wall receptacles)

- central vacuum (rough)
- central air conditioning
- burglar alarm system (p.c. 2000 Digital -
- intercom wiring -
- telephone wiring (all rooms)

Venditti stated that he had expected a system for every room in the house but when difficulties arose with the builder, he agreed that a basic system of front door, control and three stations was to be put in.

On Schedule "B", he said that "p.c. 2000 digital" was written in by the builder who left the type of intercom blank because the brochure could not be located. The brochure was later given to Venditti by the installer in the presence of the builder, said Venditti, and no comment about extra cost was made. Details of the expected system were confirmed by a letter on November 16, 1987, from their lawyer to the builder's lawyer which was to have the claim survive the closing of the transaction. Their lawyer had written:

3. Intercom system - Star System 9000 (by Rittenhouse) - master station (1): M9071, pebble grey, with M9076 control module; 3 remote stations: M9337, eggshell white; 1 door station: M9305, antique brass.

Written reminders on this item went to the builder as well on November 8 and 12, 1987.

On behalf of the Program, Paul Picard said that on a review of the documents he reached the conclusion that a "rough-in" was all that was required with respect to this intercom system. Since the matter was not specifically in the agreement in his opinion, this was a matter of contract arrangement between the home owner and the builder and he could not approve the claim.

The Tribunal concludes that both Schedules "A" and "B" must be considered and that there is evidence that a brochure was later delivered to give the details of this system. We find that

the agreement is to provide a completed intercom system and we direct the Program to instruct the installer, Gilles Blanchette, to put in the system at his quoted price of \$1,149.49; payment for which will be the responsibility of the Ontario New Home Warranty Program.

The third outstanding issue is that of the heat pump. Venditti claims that the original pump is undersized and that a "partial retrofit" is insufficient. Venditti moved his family from a gas-heated home in Georgetown and found after a year of both heating and cooling the home, that the installation of a model "48" heat pump was inadequate with the house too cold in winter and not cool enough in summer.

He stated his water source heat pump was a new kind of appliance in 1987, although it is much more in use now. A plenum heater was installed and the builder stated that the combined system would be adequate although most units now are installed with the pump size large enough to take care of the whole house without an added heater. A full retrofit was eventually done after added heaters of larger size and changes in pulleys had been tried. The New Home Warranty Program paid \$2,000.00 towards the cost of the new system; and Venditti seeks the balance of \$1,500.00 plus interest at 8% for 17 months for a total of \$1,670.00.

After a heat loss calculation by Ontario Hydro showing a need for 73,500 BTU, a model "80" pump was put in.

Venditti noted that the "48" unit had come from a supplier (The Stove Shop) who agrees that such a unit is too small for his house. Now Venditti has a good system which both heats and cools his home. He believes that the New Home Warranty Program should have gone completely and early to put a proper system in and to save him four years of inconvenience.

On cross-examination, Venditti stated that the New Home Warranty proposal of a new thermostat, a 12" fan and a 15 kw plenum heater could heat the house to 72 degrees. However, this had not been tried before and the 15 kw heater was not compatible with the "48" unit. A "65" model was suggested; and a "80" unit was in fact installed in February, 1990, which was the size that The Stove Shop had suggested in April, 1988. He now has an "80" unit with a 12" fan and a 15 kw plenum heater that has never been turned on but which could act as a backup system.

As a witness for the New Home Warranty Program, Mel Shannon of The Stove Shop in Spencerville, said that he was a full-heating contractor with 12 years' experience and had taken all the courses offered on heat loss calculations and water source heating

equipment. These units are now some 80% of his 100 units sold each year. He confirmed Venditti's comment that the "48" unit was sold by him to an installer and that he did not know where it was to be installed or whether it was sufficient for that house.

He visited the Venditti home and saw the installed system. He would have put in an "80" unit. In his opinion, the "48" unit was adequate with the plenum heater backup although it would run at all times, while he would prefer to have a system running some 80 - 90% of the time.

The thermostat was not the correct model as it would work on the heating mode but not on the cooling, and it was replaced. The 15 kw plenum heater was not from his stock. He stated that the model "48" would provide 48,000 BTU which was really a maximum of 52,000 BTU since hydro designs are 10% higher than actually required. With a larger pump and no water supply problem, this unit would be satisfactory and as well a model "65" would likely be satisfactory also. He believes that a "48" unit with the adjustments as set out would satisfactorily do the job to heat the Venditti home. In fact, he put into the home a "80" unit with a new plenum heater and a new thermostat. He noted that these units come with capacities of 48,000, 52,000, 65,000 and 80,000 BTU and that there is a difference of some \$300.00 between each model. The total installed cost of a "65" unit is about \$6,000.00 and the cost for a "80" unit is about \$6,400.00

On cross-examination, Shannon said that a plenum heater was not normally used in an average house, but could be added when a "80" unit was not enough for a very large house. In the alternative, two smaller units might be used. He has only used "48" units twice on small houses and has one for his own shop of some 3,000 sq. ft. without a basement, and with no overhead doors or high ceilings.

For the New Home Warranty Program, Paul Picard stated that the Ontario Building Code requires a system or combination which will heat a house to 72 degrees (twenty-two degrees Centigrade) when the temperature outside is - 13 degrees (-25 degrees Centigrade). Since both the "48" unit and the 15 kilowatt heater would accomplish this, the Program believes this system can work with a new thermostat. There is no authority for substitution of a new larger unit. Picard did not know of any similar problem in the Ottawa area and could only work with the system which was already installed.

After consideration of the evidence, the Tribunal finds that this claim is not a matter of workmanship, material or contractual obligation. We must find our remedy under the Ontario

Building Code if at all. We find that the system as a whole complies with the Ontario Building Code, especially with the repairs which the New Home Warranty considered and paid to a cost of \$2,000.00. There is a ground source heat pump and the thermostat has been replaced and we find that the air flow concern has been attended to. While a bigger heat pump may well be desirable, it is not a claim in this instance against the New Home Warranty Plan. If Venditti had tried the package proposed by the New Home Warranty Plan and found it unsatisfactory, then it is possible that his claim for the full cost of a "80" unit would have been successful. However, as we find there is no defect in material or anything installed in an unworkmanlike fashion, this claim must fail.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to allow the claim with respect to the intercom system, to replace the cracked tiles and to deny the claim with respect to the added costs for the installed heat pump system.

WENRUC CUSTOM DESIGN HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
JOHN HURLBURT, Member

APPEARANCES:

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 3 May 1991

Toronto

REASONS FOR DECISION AND ORDER

The Program asks this Tribunal to sustain the Proposal of the Registrar to revoke the licence of the builder and to order the builder to reimburse it for certain sums paid to complete homes.

The builder, although appealing the decision of the Registrar, has not seriously contested the decision and has offered no evidence upon which this Tribunal could alter that decision.

The two homes involved will be known as the Quistberg residence and the Barth residence. With regard to the former, the evidence supported by Exhibit 3 of tab 8 is that the Program's field inspection reselected 89 items not completed by the builder, of which 50 were transposed into a final work schedule. The deficiencies included a fireplace totally unsafe and unusable, major structural problems and numerous violations of the Building Code. Apparently the builder did not respond to the Program's request at any time since he would not acknowledge the deficiencies.

As a result of the Builder's refusal to co-operate, the Program hired its own contractors and paid out the sum of \$78,864.70 to complete the residence to the satisfaction of the Program.

The Barth's home also left with a number of deficient items as a result of poor workmanship and materials required completion by the Program to the extent of \$6,408.37.

The two sums totalling \$85,273.07 paid by the Program to complete these two residences were not challenged by the builder and leaves this Tribunal no alternative but to order the builder to reimburse the Program in that amount pursuant to section 1, subsection (3) and (4) of Regulation 728 of the Ontario New Home Warranty Plan Act.

There will also be an Order directing the Registrar to carry out his Proposal.

SCOTT AND MARGARET WILLIAMSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES:
CHARLES RUTTAN, representing the Applicant

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 28 October 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants Scott Williamson and Margaret Williamson from a decision of the Ontario New Home Warranty Program given by way of a letter dated January 21, 1991 dealing with a number of complaints as to defects in connection with their home.

There were a number of issues originally appealed to the Tribunal, but the parties have settled all but one of these which concerns the grade of the property and the elevation of various parts of the house as constructed from which this grade must extend. This issue was set out in numbered paragraph (2) of the decision letter - "Schedule A(2)" dated July 9, 1990, complaints No. 15, 16, and 17 and from "Schedule A(2)" dated November 19, 1990 complaint No.2.

These complaints are set out in the Schedules identified as follows:

15. COMPLAINT - Item #11 - Exterior grade slopes toward building.

In the Schedule this complaint is stated not to be warranted for the reason:

Warranty coverage on the following items is excluded, do to an Acknowledgment, dated December 8, 1989, and signed by the purchaser's and the builder's solicitors, thereby agreeing that the purchasers are responsible for final grading.

The Applicants entered into an Agreement of Purchase and Sale on October 16, 1989 to purchase this property from one Peter Semmens who was in the process of constructing a house upon it. The lot consisted of Part 9 of a plan of survey of part of Lot 6, Concession 9 in the Township of Medonte. This lot Part 9 was actually the northwest corner of the township lot with over 590' of frontage on the concession road between concessions 8 and 9 and 200' of frontage on a cross road known as Carley sideroad. The house was constructed about 75' south of the Carley sideroad and about the middle of the lot the other way with its front facing the concession road aforementioned to the west and its driveway coming in to the front of the house from that road. The Applicants paid \$182,000 for their property which was to include the house then presently under construction with what would be necessary to complete it to get an Occupancy Permit and including an attached list of items specified to be completed.

The transaction was to be closed and, in fact, was closed on December 8, 1989 and the purchase price was paid. At the time of closing, the final grading of the property was not complete and the parties agreed, in writing, that the purchase price would be reduced by \$1,700 and "the purchasers will assume responsibility for completion of the final grading and the vendor will be relieved of his responsibility to complete the same."

The builder, Peter Semmens, was registered with the Ontario New Home Warranty Program and did enrol the home with it as required, but the evidence discloses that this is the first and only home which he built of which the Program has any record. He appears to have been quite incompetent leaving a large number of defects from which arose many complaints. The Program was notified and after inspection warranted many defects and, in fact, has paid out between \$20,000 and \$30,000 to contractors to remedy these defects.

It concluded that a number of complaints were not warranted and the Applicants appealed with regard to four of these, three of the same have been settled as aforementioned and there remains to be heard by the Tribunal this one issue as set out above.

The Applicants brought to the Tribunal the evidence of

three professional engineers in support of their case. The first of these was Mr. J.F. Thompson of Ainley and Associates Limited, Consulting Engineers and Planners of Barrie, who has specialized in drainage and allied problems and projects. He had prepared and presented to the Tribunal a topographical or contoured survey of the north part of the lot where the house is situate showing the various elevations and changes in elevation of the property.

The second was Charles Grant, also a civil engineer who specializes in structural engineering. The other witness for the Applicant was Mr. Scott Williamson who gave certain evidence as to the lie of the land and the drainage and grading problems. From these witnesses and documents and photographs submitted, the following facts are established:

The lot, and indeed the whole area, is generally flat and low-lying, and inclined to be wet. The soil in the area is a heavy clay relatively impervious to water so that the surface water must mostly run off, if it can, or evaporate. The foundation upon which the house was built was not built high enough. It consists of an 8" cement block wall upon the top of which is set what is described as a "knee-wall" constructed of wood and on the top of this is set the supporting joists for the first floor. The block foundation is higher on the south side having a 5' block wall rather than 4' as is found on the other sides (apparently so constructed because on that side was installed the weeping tile bed which is close to the surface of the ground).

At the present time, there exists three breaches of the Ontario Building Code as related to the construction of these foundation walls. Section 9.15.4.3 requires exterior foundation walls to extend not less than 150 mm or approximately 6" above the finished ground level and it is also required that the bottom of any wooden construction on the outside of the house must not be less than approximately 8" above the finished ground level.

The elevation of the grade presently around the house does not meet these requirements and topsoil and perhaps sod has yet to be put in place on top of it to complete the grading and finish the area around the house. Two of the present breaches of the Building Code are found in the failure to meet these requirements as to height of the foundation wall and height of the wooden structure on the outside of the house above finished grade.

The third breach is found in the fact that the south foundation wall which is 1' higher is too high for a wall of this 8" thickness without support from pressure of the outside earth pressing against it. To remedy this one, either the wall must be of thicker blocks or be supported by pilasters or tied at the top

to the floor joists to provide such support.

Upon these facts the Tribunal finds that the construction of these foundation walls was done in breach of Section 13(1)(a)(iii) of the Ontario New Home Warranties Plan Act in that it was not constructed and delivered to the owners in accordance with the Ontario Building Code. There also arises the question whether these foundation walls were constructed in breach of subclause (i) of clause (a) of Section 13(1) as well in that in constructing them too low is not constructing them in a workmanlike manner. We shall deal with this point hereafter. However, these findings in this case will not necessarily make an end to the problem with which the Program and with which this Tribunal must deal.

There are put forward two alternative methods of bringing this construction into compliance with the Code, one being to lower the final grade outside the foundation walls so that the three Code violations will no longer exist and the other being to raise the concrete wall sufficiently to get the same result. Depending upon which alternative is followed, very different problems are encountered and probably opposite results follow as to responsibilities of the vendor/builder of the home and, therefore, of the Program in this proceeding.

The first alternative proposed is that of lowering the grade to allow the required 6" and 8" respectively above the finished ground level. However, if this is done, it must be done in compliance with section 9.14.6.1 of the Code which states:

The building shall be located and the building site graded so that water will not accumulate at or near the building and will not adversely affect adjacent properties.

While the Building Code does not specify a minimum slope to the grade for this purpose, the Ontario Provincial Standards standard stipulates a 2% fall of this grade and this appears to be the proper minimum here. The lie of the land around the house is such that the most fall can be got by sloping the grade to drain the water from the house to the northeast corner of the lot and into the municipal ditch there along the south side of Carley sideroad. However, to get a net fall of 2% from the sufficiently lower grade around the house to clear the defects this way, this grade would come to this ditch about 2' below its present bottom which would require the deepening of the ditch from the present 2' to a depth of 4'. Otherwise, the result would be that all of the water in the road side ditch would flow onto this property.

This deepening of the ditch would not be without complication. The ditch runs into a small stream some 575' to the east and it falls away as it leaves the stream so that the actual deepening would be required for somewhat over 400'. The permission of the Township would have to be obtained for this and it must be understood that for each foot deepened, there must be several feet widened (or the sides would fall in) and municipalities do not like ditches wider and deeper than need be because of hazard to any vehicles which may go off the road. Also there are three private driveways with culverts crossing this ditch in the path to be deepened and these would have to be lowered and extended as to width as well as to depth. We were told as well that the approval would probably be required from Ontario Hydro because of the effect on the support around the base of a hydro pole. Finally when all of this would be done, the grading of the north part of this rather large lot where the house is would be lower than the surrounding area which, as aforementioned, is all low and flat to start with and a good deal of water would come upon it in the spring or at any other time of heavy rain or runoff.

Mr. Williamson gave evidence that when he dug a post hole for a clothes pole on the lot to the east of the house, he found the water level or table to be not far from the present surface of the land.

The other alternative method of remedying the existing Code violation is to raise the cement block foundation wall to a height that the required distance would be in place between the finished grade level and the top of the cement wall and also to the bottom of the wooden construction. The evidence established that three more courses of blocks on the three sides would go up high enough to give the required clearance, but for another reason one would have to go up six more courses of blocks right to the bottom of the construction supporting the first floor. This is because if one went up with three courses, one would have the whole wall on four sides too high for its width (8" blocks), and would be in breach of the support requirements. Going up to the bottom of the first floor supports would allow tying of the walls at the top and solving the support problem that way.

This method of remedying the defects would not require any jacking up of the house as one would do it only one section at a time, taking out the knee-wall and building up by continuing the block wall, section by section. After this would be complete, one could raise the grade to a place where a 2% fall would be available to drain the whole required area into the aforementioned municipal ditch at its present level and still have more than the required 6" from the top of the grade at the wall and the top of the wall

itself and more than the required 8" up to the bottom of the wooden construction on the side of the house.

It was the submission of counsel for the Applicant that the method which should be used to eliminate the breaches of the Building Code will be to raise the concrete block wall and it is the submission of counsel for the Program that the method which should be used is to lower the grade outside the wall. Neither counsel cited any jurisprudence of assistance on this question or could point to any principle upon which it should be determined other than to argue on behalf of the Program that the warranties do not extend to the grading of the land outside the house and, therefore, the Program should not be fixed with liabilities on this account and, on the other hand to argue, on behalf of the Applicants, that the builder and the Program should not be able to escape a clear responsibility to deliver the house without breaches of the warranties provided in Section 13(1) of the Act by a finding that the owners can remedy these breaches by a course of action having all of the difficulties and downsides to them as indicated above.

It is the conclusion of the Tribunal that this issue should be resolved in favour of the Applicants. The Ontario New Home Warranties Plan Act is consumer protection legislation and the whole purpose of the operation of the Program is to protect consumers/purchasers of new homes in Ontario against losses and defects in newly built homes for which the warranties in the Act are provided. The intention of the Legislature of Ontario, clearly expressed in this statute, is that if the builder of a new home in Ontario delivers such home to the purchaser in this state where there is established a breach of one or more of the warranties set out in Section 13(1) of the Act (as is the case here) and the circumstances are not such to come within one of the exclusions set out in Section 13(2) of the Act and they do not do that here), the builder, and upon its default, the Program has the obligation of remedying the defect so that the home meets the standard which is warranted. There is no special exception or exclusion for a case such as this one in which the defect can be made to disappear by some other course of action on the part of the purchaser, particularly when such course of action would put him to considerable expense for which he has no redress and will have, as noted above, other substantial disadvantages for him.

On the facts of this case, the Tribunal concludes that in addition to the clear breach of the warranty in Section 13(1)(a)(iii) of the Act, it can probably also find the breach of the warranty in Section 13(1)(a)(i). There is, of course, no evidence of any defects in materials used, but the construction of the concrete block foundation walls not high enough and the filling

of the distance between their top and the bottom of the support of the first floor with the knee wall with the disastrous result to the grading and drainage problems can hardly be termed construction of the same in a workmanlike manner.

To remedy this defective situation, the concrete block wall should be continued up to the underside of the joists supporting the first floor. The top of the wall each way can then be given the required interior lateral support by tying them to the bottom of the floor. The point on the outside of the new foundation wall must then be found from which a grade will give a 2% fall to drain the water away into the municipal ditch on the Carley sideroad at its present depth taking the water out through the point of greatest fall namely the northeast corner of the Applicant's lot.

It would then be the additional obligation of the Program to bring the rough grade around the house up to this point and to take the same away from the house with a fall of 2% for a distance of 15'. Its obligation in this regard is restricted to the rough grade only because of the effect of the acknowledgement of December 8, 1989 by which the builder/vendor was relieved of all obligation for the finished grade in return for the abatement of \$1,700 in the purchase price. The obligation is also restricted to 15' around the house because the only legal requirement upon the builder and therefore upon the Program in this regard is found in another section of the Building Code Section 9.14.6.1 which we quoted above. There is no legal basis for this obligation to be found otherwise in the contractual document. We have nothing more specific upon which to determine this point, and as counsel for the Program put it to us, "how near is near for this purpose?"

Argument upon this question was addressed to the Tribunal by both counsel. Obviously we must give some reasonable meaning and effect to this position and equally obviously, we cannot use it to support an order to extend such grading for any great distance from the building. The distance of 15' is specified in some somewhat similar situations and it seems the most reasonable place to draw the line here.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the Applicants' claim and to have the necessary work done on these premises:

- 1) replace the knee-wall around the perimeter of the house with an extension of the concrete block wall up to the underside of the support of the first floor;

2) tie the top of the concrete block walls sufficiently to the support of the first floor to provide the inside support of these walls required by the Ontario Building Code;

3) bring the rough grade of the land outside the walls up to a point where, using a 2% fall in the grade wherefrom all water can be carried away from the building to the northeast corner of the lot and out into the municipal ditch on Carley sideroad at its present depth. This obligation on the part of the Ontario New Home Warranty Program will be restricted to providing the rough grade without topsoil or sod or seeding and will also be restricted to providing the same from the house out a distance of 15' around its perimeter.

DR. AND MRS. G.S. WONG

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
LOUIS A. RICE, Member

APPEARANCES:

MRS. I. WONG, appearing on their behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF 2 November 1990;

HEARING: 31 January, 12, 13 March 1991. Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program, rendered April 30, 1990, to disallow certain claims by Dr. and Mrs. G.S. Wong. The claims were with respect to defects in the construction of their new home and its appurtenances, the whole in breach of Section 13(1) of the New Home Warranties Plan Act. All claims were brought within the one year statutory period.

In passing, the Tribunal notes that the New Home Warranty Program did not meet its usual high standards in dealing with homeowners. In the case of the Wongs, they were treated with a singular lack of dispatch and courtesy. Mrs. Wong filed her complaint in January 1989; it took some ten months for an inspector from the Program to finally visit her residence. When the inspection was carried out, the Inspector had extensive conversations with the builder without allowing Mr. or Mrs. Wong to take part in them.

From October onward, Mrs. Wong attempted to contact the inspector on numerous occasions without receiving any response. She, therefore, brought the matter to the attention of Mr. Johnson, President of the Program, who transferred the file to Mr. Perryman. She alleges that Mr. Perryman, in February 1990, gave a handwritten list of items for the builder to carry out which he refused to give to her.

She continued calling Mr. Perryman for status reports and finally received what the Program called a "judgment letter" on April 30, 1990. It peremptorily dealt with the various complaints she had made. This "judgment" was rendered some fifteen months after the complaint was filed and no effort was made for conciliation between her and the builder despite Mr. Wong's having requested it.

The treatment of Mrs. Wong was not acceptable. The Tribunal, however, notes that counsel for the New Home Warranty Program, Mr. Steve Martin, acted in a much different manner. He has made considerable efforts to resolve the most contentious of the complaints, even intervening on behalf of Mrs. Wong to try to obtain monetary settlements with the builder.

Before reviewing the various items of complaint and rendering judgment thereon, the Tribunal notes that only Mrs. Wong appeared as a witness on behalf of the homeowners. She also produced a report by York Associates prepared by one Alex Welsh, P.Eng. She did not, however, produce Mr. Welsh as a witness so that he could be examined on statements made in his report or cross-examined on any of his observations and recommendations.

On the other hand, the Program presented the builder and numerous witnesses who had seen the problems complained of by Mrs. Wong. Some were experts; all had considerable construction experience. The Tribunal, on a number of occasions, invited Mrs. Wong to produce photographs to buttress certain verbal testimony with respect to certain of her claims, as well as to consider bringing other witnesses. The Tribunal reminded Mrs. Wong on a number of occasions that the burden of proof was on her to prove the existence of defects and to show that they fell within Section 13(1) of the Act.

With respect to the photographs, Mrs. Wong stated she had taken a certain number after the first day of hearing but that she had not had the film developed. In addition, Mrs. Wong subpoenaed no other witnesses.

The Tribunal must, therefore, decide each item of claim on the basis of the preponderance of proof and in doing so, must rely not only on the testimony of Mrs. Wong, but also of the many witnesses presented by the Program.

Mrs. Wong testified that on November 7, 1987 she contracted with JCM Construction to construct a new home for the sum of \$465,000. The contract contained a detailed specification list (Schedule "F"). Together with certain additional documents signed at a later date, the contract and Schedule constitutes the

Undertakings by the builder towards the homeowner.

The Wongs moved into their home in September 1988.

Mrs. Wong testified that she asked the builder for a Certificate of Completion and Possession but never received it. The Program officially recognized a letter of complaint sent in January 1989. Mrs. Wong claims, however, that one was sent in November or December.

At the first day of hearing, the Tribunal established a master list of complaints, Exhibit 5, since the parties could not even agree on which items were still in dispute. The hearing was then recessed to allow the Program to reinspect the premises. They did so on December 6, 1990 and produced a Report dated December 10, 1990 and filed as Exhibit 42.

The hearing then continued for proof on all the outstanding items. The Tribunal shall consider each item separately, setting out the testimony of the witnesses and then rendering its judgment thereon.

Item 1 - Problems with respect to leaking garage

Mrs. Wong testified that the builder agreed to repair certain problems with the garage, but failed to do so. She said that water came into the garage and caused puddles following rainfalls or when there was snow on the ground. She said that the floor sloped down from the driveway allowing water to flow in.

Mrs. Wong produced a report from York Associates as Exhibit 9. The Tribunal notes that at page 1 of the Exhibit, the report refers to garages and states that they are "okay".

In defence to this claim, the Program presented Mr. Morano, the principal of the builder company, as its first witness. He testified that he had been a builder/renovator for the last ten years and previous to that had worked for twelve years for Tridel, a construction company. Morano's company has built ten homes during a period of ten years, as well as doing renovations on other homes.

He testified that he received drawings from the architect of Mrs. Wong which formed the basis of the construction contract.

He used subcontractors to do the construction work and was on the site almost every day. He dealt with Mrs. Wong throughout and was last at her home in January 1991.

He testified that pursuant to her complaints, he did repairs to the garage which included sealing the concrete and the doors. He observed no spalling. His work included putting weather stripping around the doors. He has seen water in the garage, but only during winter. He believed it occurred because of snow on the Wong's car which had melted. He testified that once while on the premises, he filled a pail with water and threw it on the floor. He observed water moving towards the door; that is, the floor of the garage sloped downwards towards the door.

In cross-examination, Mr. Morano admitted that he had not registered homes he had built previous to Mrs. Wong's with the New Home Warranty Program because he was unaware that this was required. He also stated that the weather stripping was carried out after February 1990.

The next witness on behalf of the Program was Mr. Ed Perryman, Manager of the Toronto Regional office. He stated that he carried out an inspection of the garage on December 6, 1990 and found that the doors were very well sealed. He observed no accumulation of water even though there had been both rain and snow during the period preceding and during his visit. The floor showed signs of dampness, but no puddling of water near the pillars or doors. He saw no ice forming on the floor. The dampness itself, he stated, was a normal occurrence in winter when snow accumulates on a car while it is outdoors and then melts when the car is brought into the garage.

He found the workmanship with respect to the garage to be "very good".

On the evidence presented, the Tribunal finds that the Wongs have not proved the existence of any defects in the construction of the garage. Even the report of their own inspector found that the garage was satisfactory. The testimony by the builder, as well as Mr. Perryman, demonstrate a greater probability that any dampness in the garage would result from melting snow falling from Wong's car. The preponderance of the evidence showed that the construction work was properly carried out. For this reason, the Tribunal rejects the claim and directs the Program to disallow it.

Item 2 - Uneven driveway

Mrs. Wong testified that the driveway was paved in interlock stone. She chose this style of driveway. She stated that the driveway undulates creating puddles of water when it rains. The deepest puddle is 1 to 1 1/2" deep, and up to 1 1/2 feet wide. Certain photographs were produced as Exhibits 8(a) and (b).

Mr. Morano testified that he had seen puddling, but that this was not as a result of deficient workmanship. He said there was minor undulation which was caused by usage and normal soil movement. This phenomenon is known as subsidence.

The final witness to testify was Ms. Turner of the Program. She inspected the driveway and noticed a slight settlement of the interlocking paving stones near the garage door. She found the subsidence very minor - less than one-half an inch - and acceptable. Although the ground was wet, she noticed no puddling on the driveway.

The Tribunal, in looking at the photographs, could observe no excessive undulation or settlement. The driveway appeared to be laid in a workmanlike manner. Section 13(2)(h) of the Act, moreover, stipulates that no warranty is allowed with respect to subsidence. The Tribunal finds that the Applicant has not proved the existence of deficient workmanship in the driveway and, therefore, directs the Program to disallow the claim.

Item 3 - Eavestrough

The Applicant withdrew this claim.

Item 4 - Drain Pipes

Mrs. Wong testified that the end pieces of the drain pipes keep falling off and that the pipes themselves were not long enough. As a result, water flowed back towards and penetrated into the house.

Morano testified that when he visited the house in January, 1991, all the end pieces were screwed on. As to their not functioning properly, he said that the pipes were of the required length and were operating properly. Water penetration had occurred because of sand blocking the window wells - sand which Mrs. Wong was using for planting.

Mr. Turner testified that he had seen extensions on all the pipes on his inspection February 2, 1991.

Mr. Perryman testified that while walking all around the house, he did not notice any missing extensions. The extensions were of a proper length.

The Tribunal finds that all the pipes have proper

extensions and, therefore, rejects this part of the claim. The proof shows a clear preponderance of evidence that the extensions were properly installed. A recent photo, Exhibit 31, also showed the extensions were attached to the pipes.

As for the water penetration which occurred only once, the Tribunal finds that the most probable reason is the blockage of the window wells by sand. The Tribunal, therefore, directs the Program to disallow this claim.

Item 5 - Leaking skylights

Mrs. Wong complained of leaks to two skylights: the first in her dressing room and the other, on the staircase. She said that, in the case of the dressing room, leakage occurred with heavy rain or snow and that the paint had water marks. With respect to the staircase skylight, she said that the leak did not appear as serious and that she had not put any basin underneath the leak. When cross-examined, Mrs. Wong was unable to give specific proof showing the existence of the leaks.

Mr. Morano stated that he had visited the home twice. In January 1991, he sent a roofer to inspect and the roofer said that there was no problem with the skylights.

He went on to say that he had never seen any water dripping from underneath the skylights, but had seen water on the floor. He thought that this resulted from condensation because if there was leakage through the skylight itself, the walls would be peeling or crumbling.

Mr. Ross testified that he went on behalf of the Program to check the ensuite skylight. He said that even though snow was melting on the roof, he saw no leak in the skylight. He saw no evidence of water or staining.

Mr. Perryman testified that he saw no stain marks on the drywall even though he asked Mrs. Wong to show him the stains she complained of. As a result, he concluded that there was no ongoing leak in the staircase skylight. When he asked Mrs. Wong when the skylight had last leaked, she said she could not remember. Despite heavy rain, Mr. Perryman and the others from the Program never saw any dripping from the skylights and saw no water on the floor.

The Tribunal believes that if there was any water dripping from the skylight, the most probable explanation would be condensation. On the proof presented, there is no evidence of any leaks to the skylights themselves. Mrs. Wong has, therefore, not

proved her claim and the Tribunal directs the Program to disallow this claim.

Item 6 - Cracked marble tiles

Mrs. Wong testified that there were one or two tiles in her bathroom which were cracked. In her dressing room, there were two or three tiles with similar cracks. The cracks were anywhere from 6 to 9 inches in length.

Although invited by the Tribunal to bring photographs of the cracked tiles, Mrs. Wong did not do so.

In cross-examination, Mrs. Wong said that she was the one who selected the tiles and that they were black with white veins.

Mr. Morano testified that there were no cracks in the marble tiles. The cracks of which Mrs. Wong complained were really only veins that occurred naturally in the marble. Such veins can be felt when touched.

Mr. Perryman testified that on inspecting the marble tiles, he saw veins, but no cracks. He stated that he was familiar enough with tiles to distinguish between veining and cracks.

The Tribunal believes that Mrs. Wong has not established the existence of cracks in the marble tiles. The preponderance of proof would indicate that the cracks were really only veins which occur naturally in such tile. The Tribunal, therefore, directs the Program to disallow this claim.

Item 7 - Kitchen Fan Hood not installed

Mrs. Wong testified that a fan hood was not installed in the kitchen in breach of the construction contract which called for the installation of a high power exhaust fan hood.

She testified that she had granted the contracts for the installation of kitchen cabinets to a contractor and that the contractor was to work with the builder to complete construction of the kitchen. The builder supplied the kitchen sink and accessories. The builder also installed a fan to which any hood would have been connected.

Mr. Morano admitted that the builder had not installed the hood, but said that it was the responsibility of the subcontractor to provide it. He was of the opinion that a cabinetry contract would include a hood.

Mr. Perryman testified, that in his opinion, the fan hood was part of the subcontract for cupboards and was, therefore, not the builder's responsibility.

The Tribunal, in deciding whether the Program should provide a hood, must determine whether it remained the responsibility of the builder to do so after the subcontract was entered into. If it was the builder's responsibility to provide it, the Program would also be bound to do so, since the failure to provide the hood constituted a deficiency in workmanship.

Exhibit 44 established the allowance the builder gave to Mrs. Wong with respect to the kitchen. Since Mrs. Wong was going to deal directly with a subcontractor, the builder had agreed that a certain sum should be taken off the construction price to take into account the value of work which the builder no longer had to provide.

In the case of the kitchen, Exhibit 44 referred to kitchen cabinets and counters only, and gave an allowance of \$20,000 - this included the bathroom vanity and laundry room vanity. No allowance was made for a hood. The Tribunal must, therefore, presume that the builder remained responsible for providing and installing a hood. This is borne out by the fact that despite the cabinetry contract, the builder installed a fan, a kitchen sink and accessories.

It would be illogical to impose on Mrs. Wong the expense of providing and installing the hood when she received no compensation of any sort from the builder to take account of such an expense.

The Tribunal holds that Mrs. Wong has established her claim and, therefore, directs the Program to provide and install an appropriate fan hood in the kitchen.

Item 8 - Bathroom fan defective

Mrs. Wong testified that the fan in the bathroom was excessively noisy. Although the Tribunal suggested that she produce objective proof of the noise level, Mrs. Wong did not do so. In support of her claim, therefore, the Tribunal has only her subjective opinion.

Mr. Morano testified that to placate Mrs. Wong he replaced the motor on the fan which she found noisy. This did not satisfy her. In his opinion, the fan was no more noisy than a

standard fan or the fans in her other bathrooms. One can hear the flywheel turning in any fan; in her fan no metal hits other metal.

Mr. Turner testified that he did not find the fan excessively noisy. He was able to carry on a normal conversation with Mr. Perryman while the fan operated.

Mr. Perryman corroborated Mr. Turner's testimony.

The Tribunal finds that Mrs. Wong has not proved her claim and, therefore, directs the New Home Warranty Program to disallow this claim.

Item 9 - Heated floor and bathroom not installed

Mrs. Wong testified that the builder failed to install a heated floor in the bathroom despite his undertaking to do so in the construction contract. She produced no experts to testify to the cost of installing such a floor, but did produce a quote for \$4,200.

Mr. Morano admitted that the builder did not install the heated floor. He produced as Exhibit 34(A), a quote indicating that the cost to remove the tile, install the heating cable and then replace the tile would be \$2,450. He offered Mrs. Wong \$3,000 as compensation in lieu of removing the tile and installing a heated floor. Mrs. Wong refused the offer.

Mr. Perryman testified that it was not sensible to tear up the floor to install the heated one and that Mrs. Wong should solely receive compensation of \$1,000.

The Tribunal finds that the builder performed his work in a deficient manner when he failed to provide the heated floor. The cost to correct the work is not excessive, and it is clear from the testimony that the primary intent of the Wongs was to have a heated floor. Under the circumstances, the Tribunal believes that the Program should be ordered to install a heated floor in the bathroom, and may use the contractor of its choice to do so.

The Tribunal, therefore, directs the New Home Warranty Program to see to the installation of a heated floor in the bathroom.

Item 10 - Heat light in bathroom not installed

Mrs. Wong testified that in the construction contract, the builder undertook to provide a heat light in the bathroom. Despite this undertaking, only an ordinary light was installed.

Mr. Morano admitted that the builder failed to provide a heat light, such a light would cost approximately \$150 to install.

The Tribunal believes that Mrs. Wong is entitled to the heat light and, therefore, directs the Program to proceed to the acquisition and installation of a heat light in the bathroom.

Item 11 - Double enamel laundry tubs not installed

Mrs. Wong testified that despite the construction contract, double enamel tubs were not installed. In cross-examination, she admitted that she herself was the one who chose the tubs which were eventually installed by the builder.

Since it was Mrs. Wong who chose the tubs that were installed, the builder cannot be held responsible for the tubs not being double enamel. The Tribunal therefore directs the Program to disallow the claim.

Item 12 - Leaking sinks and faucets

Mrs. Wong testified that there were leaks underneath the vanity and that the leaking problem existed in all three bathrooms upstairs as well as the kitchen. In cross-examination, she stated that she had not noticed the problem in many months.

Mr. Turner testified that on his inspection, he saw brownish dry paper in the vanity. He tested for leaks by turning on the water and splashing; he saw no evidence of water coming through in the ensuite bathroom or near the kitchen sink.

Mr. Perryman testified that he also had tested for leaks and found none at any of the locations complained of. He ran the water, splashed it and also overflowed the sink with no leaking apparent. He saw no stain marks nor blistering which would be telltale signs of water leakage.

The Tribunal believes that Mrs. Wong has failed to establish her claim and, therefore, directs the Program to disallow the claim. Her testimony was very imprecise and no objective

evidence was presented which would establish the existence of a leak. On the contrary, all the evidence would indicate that there were no leaks.

Item 13 - Wood falling in attic

Mrs. Wong testified that at one time, she heard what she thought was wood falling inside the attic.

She herself never inspected the attic nor did she engage any other person to do so. As a result, the Tribunal has before it only her conjecture that wood might have somehow fallen in the attic without any concrete evidence thereof.

Mr. Morano testified that he went up to the attic with a flashlight and poked his head inside. He could see nothing. He thought that the noise occurred through expansion and contraction caused by changes in weather.

The Tribunal believes that Mrs. Wong has presented no evidence of a defect in her attic. As a result, the Program is directed to disallow the claim.

Item 14 - Pipe for wet bar exposed in front of drywall

Mrs. Wong testified that certain pipe was put in front of the drywall instead of behind it and is, therefore, exposed to view. She felt that this constituted deficient workmanship by the builder.

Mr. Morano testified that the pipe was exposed on the outside of the wall. He admitted that a normal buyer would expect the drywall to cover the pipe and that it was an oversight on the builder's part in failing to do so. He stated that the builder was prepared to cover up the exposed pipe by boxing it in.

Mr. Perryman believed that the exposed pipe was acceptable.

The Tribunal finds that the workmanship was not of proper quality. The Tribunal, therefore, directs the New Home Warranty Program to cover the pipe by boxing it in the manner proposed by the builder.

Item 15 - Fireplace heatilators not working

Mrs. Wong testified that insufficient heat was generated by the heatilators. She, therefore, believed that the heatilators were not functioning properly.

In cross-examination, she stated that she had only used the fireplace in the family room and not the other two fireplaces.

Mr. Morano testified that the heatilators worked properly. He said that Mrs. Wong expected more heat than such fireplaces would normally generate. He himself had lit a fire in the fireplace in the family room, and found that the heatilator functioned properly. He tested for drawing power in the basement fireplaces and found that they drew satisfactorily.

Mr. Perryman testified that the heatilators were properly installed. He said that heatilators are usually not very efficient in enhancing warmth and that Mrs. Wong's expectations were excessive. There were no problems with the design or workmanship of the fireplaces.

The Tribunal finds that Mrs. Wong has failed to establish her claim and, therefore, directs the Program to disallow the claim. On the proof presented, Mrs. Wong received fireplaces and heatilators which functioned properly.

Item 16 - Uneven and crooked light switches

Mrs. Wong testified that light switches in the kitchen and hallway were unacceptable because of their unevenness. Although invited by the Tribunal to present photographs of these switches, Mrs. Wong did not produce any. She stated that she had taken photographs, but had not had the film developed.

Mr. Morano testified that he tried to straighten out the switches, and believes the problem was corrected.

Mr. Perryman found no defects or anything "offensive" in the switches.

The Tribunal finds that Mrs. Wong has not established her claim. The Tribunal has only her subjective opinion as to the aesthetic quality of these light switches. Against this is the testimony of the builder and the Program which find them suitable. The preponderance of proof indicates that the light switches are acceptable and the Program is, therefore, directed to disallow the claim.

Item 17 - Water in basement

Mrs. Wong testified that water was coming into her basement along one side of a wall. In cross-examination, she stated that the water was 1" deep in places and covers from 2 to 3'. She also stated that all grading slopes towards the house and this was the cause of water coming into the basement.

Mr. Morano testified that he believed if there was any flooding, it was caused by sand blocking the window wells.

Mr. Perryman testified that he saw no dampness on his inspection and no indication of water along the wall, despite the fact that it had previously rained hard and there was also snow. He saw no staining or any evidence of leaks in the basement wall. He also no saw no evidence of leaking in the exterior walls.

The Tribunal notes that in the report presented by Mrs. Wong, it states at page one that Mrs. Wong should "keep window wells clean of debris".

The Tribunal also notes that in her testimony, Mrs. Wong did not indicate a continuing problem of leakage into the basement. It seemed to have happened on only one occasion. The preponderance of proof would indicate that if any flooding had ever occurred, it was because of blocked window wells. Since that event, there appears to have been no further leaks into the basement. Mrs. Wong's own report buttresses this conclusion.

The Tribunal finds that Mrs. Wong has failed to establish the existence of any defect or leak. The Tribunal, therefore, directs the Program to disallow this claim.

Item 18 - Electrical plugs

Mrs. Wong testified that one four-way switch in the bedroom did not work. The electrician admitted this to her, but refused to change it. She also complained that the outside light short circuited frequently. Once she pressed the fuse switch, however, the outside light would come back on.

Mr. Morano testified that the four-way switch was repaired in January 1991 and should be functioning properly. The report by his expert, Exhibit 34, stated that the switch might have to be replaced if the problem continued.

Mr. Perryman testified that the four-way switch worked properly and he could find no defects in the outside light standards. The fact that the circuit cut out did not mean it was defective, but rather that it was reacting to humidity as it was designed to do.

The Tribunal believes that Mrs. Wong is entitled to a new four-way switch. The expert of the builder stated that such replacement would be proper if the repair work did not succeed in solving the problem. It is clear from the testimony of Mrs. Wong that the switches are still not working properly. The Tribunal, therefore, directs the Program to replace the four way switch.

As to the outside light, the Tribunal finds that it is working properly. The fact that it short circuits demonstrates that it is reacting to humidity as it was designed to do. The Program, therefore, is directed to disallow this part of the claim.

Item 19 - Windows in basement

Mrs. Wong testified that the basement windows could not be opened properly. She also stated that colonial grills were not installed in the windows even though they were promised in the construction contract (Exhibit 6). These colonial grills were to be installed on the five basement windows facing the street or neighbour's homes.

Mr. Morano admitted that the colonial grills had never been installed and undertook to do so.

Mr. Perryman testified that the builder was ordered to make adjustments to the windows to allow them to function properly and that this was done. He observed no problems in opening and closing the windows.

The Tribunal finds that Mrs. Wong is entitled to the colonial grills on the five windows mentioned above and, therefore, order the Program to see to their installation.

The other part of Mrs. Wong's claim with respect to the functioning of the windows is dismissed.

Item 20 - Leaks in ceiling

Mrs. Wong testified that there were leaks in the ceiling of her study. She said that these leaks came from the upstairs bathroom. She went on to state that the builder came to do some

caulking. Since that time she has observed no further leaks, but was uncertain whether he had carried out the repairs properly. The repainted ceiling showed no signs of any further leaks.

The Tribunal finds that Mrs. Wong has not proved the existence of any continued leaking in the ceiling of the study and, therefore, directs the Program to dismiss this part of the claim.

Mrs. Wong also complained of leaking in the solarium windows, but in cross-examination stated that she had seen no leaking since before Christmas. Nor did she see any stains or peeling in the recently completed paint job. This claim is also rejected by the Tribunal because of the failure of Mrs. Wong to establish the existence of a defect.

Item 21 - Plumbing not completed according to contract

Mrs. Wong testified that the builder failed to provide a drain for a roughed in bathroom in the basement. She stated that she intended at some point to put in a bathroom, but was very unspecific as to when this was to be done.

Mr. Morano testified that the bathrooms had been roughed in as required and that this included a drain for the bathtub. The drain was installed under the concrete floor. He produced a letter from his plumber which clearly states that a drain had been installed as required.

Under the circumstances, the Tribunal reserves Mrs. Wong's right to having a drain pipe installed when she builds her bathroom if she should find that the drain has not been installed. The Tribunal reserves this right for a period of two years beginning from the date of this judgement.

Item 22 - Cracks in walls and ceilings

Mrs. Wong testified that the cracks in the walls and ceilings had been repaired, but feared that they would reappear again. She admitted that to date, there had been no reappearance of the problems.

The Tribunal finds that the repairs have been carried out and, therefore, directs the Program to reject this claim.

Item 23 - Crumbling concrete floor in garage

Mrs. Wong stated that the garage floor was crumbling to a minor degree where water was on the floor in a small inside area near the garage doors.

Mr. Morano testified that the problem was caused by salt on the car which caused corrosion when it mixed with the water on the floor.

The Tribunal finds that Mrs. Wong failed in her burden to prove the existence of a defect. The Tribunal, therefore, directs the Program to disallow this claim.

Item 24 - Crumbling concrete front steps

Mrs. Wong testified that the concrete was crumbling on the bottom two steps. Patching up the steps did not solve the problem.

Mr. Morano testified that the problem occurred as a result of salt as well.

Mr. Perryman testified that the steps appeared in proper condition when he inspected them in December 1990.

The Tribunal does not believe that the problems of which Mrs. Wong complains occurred as a result of salt. The Tribunal, therefore, directs the Program to check the steps and to carry out repairs where required.

Item 25 - Inadequate and imbalanced heating system

Mrs. Wong complained that certain rooms of the home which were on the northern side were colder than rooms in other parts of the home. The Tribunal suggested that she take temperature readings of the various rooms, which Mrs. Wong did. The readings indicate that the variation in the temperature was plus or minus 2 degrees celsius from the reading on the thermostat.

Mr. Perryman said that this variation of is within an acceptable range.

The Tribunal finds that the variation is within a normal and acceptable range and, therefore, orders the Program to disallow the claim.

Item 26 - Bird's nest inside eavestrough and soffits

Mrs. Wong testified that at one point, birds came in through a gap in the soffit. She paid \$445 for a contractor to correct the problem by installing wiring to block penetration through any gaps. At some time later on, the builder came in to carry out repairs and in doing so removed the wiring.

Mr. Morano admitted that wiring had been removed, but that he had done so in order to carry out the repairs to close the gap.

As a result of those repairs, it is now impossible for birds or squirrels to get into the soffits.

Mr. Perryman testified that he had asked the builder to do repairs because the gaps in the soffit were unacceptable. The builder had done so in a satisfactory manner.

As to the claim for monies spent on repairs by Mrs. Wong, he stated that this should not be reimbursable because Mrs. Wong should have waited for the Program to order the repairs to be carried out.

The Tribunal finds that it is unreasonable to deny Mrs. Wong reimbursement for expenses paid to solve her problem. As was stated at the beginning of this judgement, the Program took excessively long to inspect the home and then order the repairs. Mrs. Wong should not have to suffer because of the failure of the Program to act in a diligent manner. As a result, she was well within her rights in spending her own money to have interim repairs carried out. The Tribunal also finds that the repairs ultimately done by the builder should solve the problem.

As a result, the Program is directed to reimburse Mrs. Wong the sum of \$300.00. While Mrs. Wong claims \$445.00, the invoice she produced indicates that that sum covered other repairs as well.

Item 27 - Warped hardwood floor and lifting parquet floors in basement

Mrs. Wong testified that part of the floor problem buckling was repaired, but that the floor still was warped. She, therefore, expected the problem to reoccur.

Mr. Morano testified that he had carried out repairs on the floor in the basement and that there was no heaving in the parquet.

Mr. Perryman testified that Mrs. Wong had only complained of buckling parquet and not about curvature or warping. He inspected the floor and found nothing abnormal.

The Tribunal finds that Mrs. Wong has not established that there is any continuing problem with the parquet floor. Since the repairs, there has been no further buckling of any sort. The Tribunal, therefore, directs the Program to dismiss this claim.

Item 28 - Cracked stones; chipped stone window sill

Mrs. Wong admitted that she did not know which window sill was chipped. The Tribunal, therefore, dismisses this part of her claim.

Mrs. Wong also complained of a chip in the stone pillar at the end of her driveway.

Mr. Morano testified that there was a chip in the pillar but that it was not there at the time the home was delivered. Messrs. Turner and Perryman testified that they did not know how the chip occurred, but believed that it was not covered by any warranty since it occurred after the home was delivered.

The Tribunal finds that Mrs. Wong has not proved her claim. There are many possible reasons for the existence of the chip in the pillar and no proof that the chip existed at the time that she took possession of her home. The Tribunal, therefore, orders the Program to reject this claim.

Item 29 - Improper grading, sloping towards the house

Mrs. Wong testified that the grading sloped toward the home which allowed water to come into the foundation. In cross-examination, Mrs. Wong admitted that she had put in topsoil, but that this topsoil did not rise above the grading.

Mr. Morano testified that the site plan was accepted by North York and the grading could not be altered without breaching the by-laws of North York. He also stated that any sloping would be away from the home and not towards it.

Mr. Turner testified that he walked around the entire

home to check the grading and saw no dipping towards the home and no excessive sloping.

Mr. Perryman, on his inspection, saw no problem with the grading.

The Tribunal finds that Mrs. Wong has failed to prove that the grading was done in an improper fashion. On the contrary, the proof indicates that the grading was proper. As a result, the Tribunal orders the Program to disallow this claim.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the New Home Warranty Program to allow claims 7, 9, 10, 14, 18 (in part), 19 (in part), 21, 24, 26 (in part); and to disallow claims 1, 2, 3 (withdrawn), 4, 5, 6, 8, 11, 12, 13, 15, 16, 17, 20, 22, 23, 25, 27, 28, and 29.

DUNCAN WRIGHT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
LUCIENNE BUSHNELL, Member
JOHN CORSI, Member

APPEARANCES: DUNCAN WRIGHT, appearing on his own behalf

S. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 31 July 1991 Ottawa

MAJORITY DECISION

This is an appeal to the Commercial Registration Appeal Tribunal by Duncan Wright from a decision of the Ontario New Home Warranty Program rendered in a letter dated March 19, 1991 to Mr. Wright. The relevant facts are as follows:

On November 17, 1989, Mr. Wright entered into an Agreement of Purchase and Sale with one Robert Oakley in trust to purchase a town house to be known municipally as 22 Royal Oak Court in Ottawa for \$127,900. The town house was under construction at the time and the closing was fixed for March 30, 1990. About three weeks before this closing date, the builder/vendor went into bankruptcy and did not complete either the construction of the town house or the transaction of purchase and sale with Mr. Wright. This builder had been registered under the New Home Warranties Plan Act and the unit in question had been duly registered and accordingly Mr. Wright made a claim upon the Program for the return of his deposit of \$10,000 under Section 14(1)(a) of the Act and was paid the same by the Program.

The Royal Trust Corporation of Canada which held a first mortgage on the property then took possession of the same on June 16, 1990 and pursuant to a power of sale in its mortgage, entered into a new agreement with Mr. Duncan Wright to sell the same property to him for \$104,000. Paragraph 6 of this agreement provided:

The real property is sold on an "as is" basis, it being understood that there are no representations or warranties made as to the condition of the property, the terms and conditions, status or priority of tenancies, the lawfulness of the present use or the zoning or development potential of the real property. Further, the Vendor expressly denies that it is a Vendor within the meaning of the Ontario New Home Warranties Plan Act and that the warranties under the Act are extended or apply to the Purchaser as the real property is uncompleted and it is not being sold to the Purchaser for occupancy and the Purchaser acknowledges the same.

There was attached to this Agreement, Schedule "B" which reads as follows:

The following list is a list of incomplete or missing items noted by the purchaser, the accuracy of which is not warranted by the vendor.

- | | |
|----------------------|--|
| (1) Kitchen | Cabinets, Range Hood, Sink,
Plumbing Fixtures, floor,
Vent and heating grills. |
| (2) Main
Bathroom | Vanity, hardware, wall tiles,
tub plumbing fixtures, floor,
towel bar, soap dish, toilet
paper holder, vent & heating
grill. |
| (3) Bath
Ensuite | Vanity, Hardware, wall tiles,
tub plumbing fixtures, floor,
towel bar, soap dish, toilet
paper holder, vent & heating
grill. |
| (4) Powder
Room | Vanity, sink, toilet,
plumbing fixtures, toilet
paper holder, towel bar,
floor, vent & heating
grill. |
| (5) Basement | Humidifier, drain cap in floor. |

- (6) Others: Installation of 1/2 rounds,
 paint entry, and garage entry
 door, Vestibule floor, Living
 room floor (carpet), stairs
 (carport), 1st floor hall
 (Carpet), Bedroom 1,2,3,
 Floor (carpet) Vents & heating
 grills throughout, fireplace
 facing doors, mantle, hearth.

The Purchaser acknowledges that the final building, electrical plumbing and any other applicable inspections by the authorities responsible therefor are not available and will not be obtained by the Vendor.

Royal Trust did not register the property with the Program, did not provide any inspection or certificate under Section 13(3) of the Act on closing and did not consider itself to be a vendor within the meaning of the Ontario New Home Warranties Plan Act.

Mr. Wrighte stated during his evidence that about a week before entering into the agreement on June 28, 1990, he telephoned the office of the Program in Ottawa and enquired of someone there as to whether, if he re-purchased the town house from Royal Trust, he would be covered by the Warranty Program. He said he was told by this person that he would not be covered for the minor defects for which complaint had to be made within one year, but he would be covered for the more major structural defects. He did not obtain the name of the person to whom he spoke.

Heather Mayhew who was the conciliator from the Ottawa office who dealt with this claim and who gave evidence at the hearing said that she had no record and no knowledge of information concerning such a telephone call and further, that if the correct facts of the situation had been understood by anyone in the office, it would have been clear that the home would not be covered. In any event, the only liability to any purchaser by the Program must be imposed by the Ontario New Home Warranties Plan Act or by Regulations made under it. If there is such a liability imposed in a given case, the fact that someone in one of its offices might tell a purchaser there was no coverage would not negate the coverage. Likewise, if there is no such liability, the fact that someone in one of its offices said that there was certain coverage would not impose this liability or create the coverage.

On July 13, 1990, Mr. Wrighte closed his transaction with Royal Trust and took possession of the property. He then proceeded to get the items listed in Schedule "B" above mentioned finished. For some of these he hired third parties and some of the work he did himself. He said that between what he paid out and the value of the work which he did himself, he just about accounted for the difference in his purchase price from Royal Trust and that set out for the completed house in the original agreement with the builder.

The claim which he has made against the Program and is pursuing on this appeal is a claim for a defect in the work of the original builder, namely, that the insulation is not properly installed and some vapour barrier is missing so that, in cold weather, cold air blows in under the overhang over the front porch and it can get quite cold in one bedroom and in the bathroom. There is no doubt that these defects resulted from faulty workmanship on the part of the original builder. Mr. Wrighte is not making any claim for work which he had finished after his purchase.

The sole issue to be determined by the Tribunal is whether, upon the facts of this case, the purchase of this town house by the Applicant from Royal Trust was covered by the warranties set out in Section 13(1) of the Ontario New Home Warranties Plan Act. Any recovery upon such warranties must be made under Section 14 of the Act. The effect of paragraph 6 of the Agreement of Purchase and Sale between the Applicant and Royal Trust is to render inoperative all warranties except those specifically preserved by subsection (6) of Section 13 of the Act. The Applicant cannot have the benefit of any other warranty either express or implied.

To qualify for a warranty here, this must be a "home" as defined in Section 1(b)(i) of the Act.

"home" means:

- (i) a self-contained one-family dwelling, detached or attached to one or more others by common wall;

The Applicant must be an "owner" as defined in Section 1(g):

"Owner" means a person who first acquires a home from its vendor for occupancy...;

and Royal Trust must be a "vendor" as defined in Section 1(n):

"vendor" means a person who sells on his own behalf a home not previously occupied to an owner....

Clearly the Applicant is an owner if the Royal Trust is a vendor, and Royal Trust is a vendor if the town house was a "home" within the definition. This is the crucial question. How complete does the home have to be to qualify as a "self-contained one-family dwelling". It is the conclusion of the Tribunal that for this purpose it must be sufficiently complete for a person or a number of persons constituting a family to dwell in it. This conclusion is supported by reference to relevant sections of the Ontario Building Code. It is to be noted that the third warranty set out in Section 13(1) is that the home "(iii) is constructed in accordance with the Ontario Building Code".

In Section 1.3.2 of the Code:

Dwelling unit means a **suite** operated as a housekeeping unit, used or intended to be used as a domicile by 1 or more persons and usually containing cooking, eating, living, sleeping and sanitary facilities.

Section 2.4.3.2(1) provides:

A person may occupy or permit to be occupied a **building** intended for **residential occupancy** that has not been fully completed at the date of occupation provided that

.....

(b) the following **building** components and systems are complete and operational

.....

(ii) water supply, sewage disposal, lighting and heating systems,

.....

A further provision in Section 9.32.3.2 states:

- (1) Where a piped water supply is available, piping for hot and cold water shall be

connected to every kitchen sink, lavatory, bathtub, shower, slop sink and laundry area.

- (2) Piping for cold water shall be run to every water closet and hose bib.

The Agreement of Purchase and Sale of this town house from Royal Trust to the Applicant in the "as is" unfinished condition as abandoned by the builder did not contemplate or constitute a sale of a dwelling unit or home within the meaning of either the Ontario Building Code or the critical definition in the Ontario New Home Warranties Plan Act and, therefore, it is not covered by the warranty set out in Section 13(1) thereof.

Accordingly pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicant's claim herein.

DISSENTING DECISION

by Lucienne Bushnell, Member

I have read the reasons for judgment of the Vice-Chairman herein, and I am not able to agree with the conclusion which he has reached. In my opinion, the property which Mr. Wrighte bought from Royal Trust and of which he took possession on July 13, 1990 was a "home" within the meaning of Sections 1(d)(i) and 13(1) of the Ontario New Home Warranties Plan Act. The provision of paragraph 6 of the Agreement does not deprive the Applicant of the benefits of the warranties in Section 13(1) because of the express provisions of Section 13(6).

There is nothing in the Ontario New Home Warranties Plan Act incorporating in it any provisions of the Ontario Building Code for the purpose of determining how complete a building must be before it becomes a "home" or "dwelling" as defined in that Act and, in my view, this question should be determined without reference to it for this purpose. These are statutory definitions and, therefore, only have the application which they are stated to have.

Upon the evidence which we have, the only items in the list on Schedule "B" to the Offer of Purchase and Sale from Royal Trust which are of sufficient consequence to raise a serious question as to whether their absence renders the home not sufficiently complete for this critical purpose are items of plumbing. The evidence established that all of the roughed in plumbing was in place and ready to connect up to the sinks, toilets, and tub and other plumbing fixtures in the various bathrooms, powder rooms and kitchen. This was clearly a home sold by Royal Trust to the Applicant which needed the completion of this relatively small list of items and, therefore, it comes within the definition.

Of course, by reason of Section 13(2)(a), the Applicant could make no recovery for defects in the completion of the items set out in Schedule "B" which he had completed later. However, the claim here is confined to defects in work which was completed by the original builder before the Applicant purchased the property from Royal Trust and is not within this exception.

I would, therefore, by virtue of the authority under Section 16(3) of the Ontario New Home Warranties Plan Act allow the claim of the Applicant with regard to the defects in the installation and the vapour barrier and direct that the Ontario New Home Warranty Plan arrange for the performance of the work necessary to remedy these defects.

CHARLES ZAMARIA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
GORDON R. DRYDEN, Vice-Chairman as Member
WILLIAM WATSON, Member

APPEARANCES:
CHARLES ZAMARIA, appearing on his own behalf
STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 3 October 1991 Toronto

REASONS FOR DECISION AND ORDER

There were a number of complaints by the homeowner with respect to defects in workmanship and material in the construction of his new home.

The first item of which the homeowner complained was cracked bricks. The homeowner was concerned that these bricks would permit water to penetrate the house. In the photographic evidence which the homeowner submitted, the cracks did not appear to be of a major size. Moreover the homeowner filed a letter from Canada Brick dated January 7, 1989, which stated in part: "The fissures on the face of the brick are part of the aesthetics of the panel." The letter also went on to provide that should there be a failure in the wall, "We will replace the brick at no charge to you or your purchaser."

The Marketing Manager for Canada Brick was called as a witness and he stated that it was a good masonry job with no problem cracks. He indicated that the brick was in accordance with the Ontario Building Code and the Canadian Standards Association Guidelines. He again reiterated the fact that Canada Brick would stand behind its product. On the basis of this evidence, filed both by the homeowner and the Program, the Tribunal finds this item not to be a defect.

The homeowner also complained about cracked mortar in two or three locations. Again the photographic evidence submitted by the homeowner appeared to indicate that these cracks were of a minor nature. There was no evidence of water seeping into the house as well. The Program pointed out that this complaint was raised more than one year after the taking of possession of the home and accordingly on both counts, the Tribunal finds this not to be a defect and not to be warranted.

The homeowner complained then of heat loss and pointed out that a Work Order had been issued on February 20, 1990. The evidence subsequently filed indicated, however, that this Work Order had been lifted and, in fact, the witness from the Municipality indicated that the Order was lifted on advice from the homeowner. The homeowner indicated that he was concerned about possible future heat loss, but given the fact that it is now more than a year and a half after the correction of the item and the homeowner indicates no problem, the Tribunal is not prepared to acknowledge this as a defect. The homeowner also identified the fact that he had removed a portion of drywall and found a split heating pipe. He confirmed, however, in his evidence that the builder through its subtrade had corrected this defect so that essentially his only claim would be for materials and possibly some of his own labour in restoring the drywall. The Program's position was that this specific item was not reported within the year and that the heating problem had been satisfactorily resolved in 1990. The repair of the heating pipe was done by the builder in August of 1991.

Again on both counts, the Tribunal finds there to have been no defect proven by the homeowner and as far as the repair is concerned, it was caused by the homeowner and not reported within the first year.

The next complaint of the homeowner was that noise went between his home and the adjacent home. This is a townhouse complex. The representative of the owner indicated that the soundproofing was within proper Building Code requirements and in any event, it was pointed out that paragraph 29 of the Agreement of Purchase and Sale provided as follows: "The purchasers are hereby advised that despite the inclusion of noise control features within the development area and within the individual building units noise levels may continue to be of concern occasionally interfering with some activities of the dwelling occupants." The Tribunal finds that the homeowner has failed to prove a defect and that proper notice was given to the homeowner prior to his purchase by the words quoted from his Agreement of Purchase and Sale.

The next item the homeowner complained about was with

respect to a dead tree and that others in the subdivision have had trees replaced. He also complained about his grass not growing properly. The Program filed photographs taken a day prior to the hearing which showed the grass and shrubbery on the property acceptable. The representative from the builder indicated that if there were problems in this area, the subdivision agreement would require the matter to be corrected, but testified he did not believe that this was, in fact, the case. The Tribunal finds that this is another matter not proven by the homeowner and in any event would relate to the Municipality's requirements under its subdivision agreement. The Municipality not making any complaint, there is no obligation on the builder in regard to this item.

The next item of which the homeowner complained was a cracked basement wall which was patched on the interior in February 1989 and one year later sealed on the exterior in June of 1990. The homeowner testified that he had had no problem since that time. The Program also countered this was not a complaint raised within the first year and that it would not, therefore, be warranted. The Tribunal finds on both counts again that there is no defect covered under the warranties in the Act. In particular, the fact that there has been no problem for approximately one and one-half years would also indicate that there is no warranted defect.

The next complaint of the homeowner was that he was supposed to have had a fence installed but that this was not done by the builder and, therefore, the homeowner had built a fence and wanted compensation therefor. The Tribunal is not satisfied that this item was covered in the Schedule "C" to the Agreement of Purchase and Sale, and in any event, the representative from the builder testified that the fence built by the homeowner did not comply with Municipal requirements and in fact, the builder may be required to remove the fence. The Tribunal, therefore, finds that this is not a matter for which there is a warranty to the homeowner, nor is the homeowner entitled to compensation.

The next complaint of the homeowner was that there was deteriorating paint covering the plywood below the front bay window of the dwelling. This was covered under the Work Order and on the evidence before the Tribunal was properly corrected. A photograph was submitted by the Program showing the painting to be satisfactory. The Tribunal is of the view that the homeowner has failed to prove any claim for damage in respect to this item.

The next item of which the homeowner complained was that he discovered in July of 1991 cracked supporting beams in the attic. The evidence of the Program was that these were not support beams and that it was normal construction. Again the Program took the view that this was a complaint filed after the end of the first

year of possession and the Tribunal agrees that this is not a warranted item.

The homeowner complained about cracked wood and a cracked concrete slab at the rear of the building. The Program's position was that this complaint was filed after the first year and was not warrantable. The Tribunal concurs in this decision of the Program.

The next complaint of the homeowner was that the wooden window installation on the front bay window was improperly installed resulting in water leaking into the living room in July of 1991. The Program took the view that this was an item referred to the Program more than one year after the possession and it has never been reported in writing to the Program. The Tribunal concurs that this is not a warranted item.

The homeowner also complained that he had not received as many patio slabs as he thought he should be entitled to. Nowhere in the Agreement of Purchase and Sale was there a stipulation as to the number of patio slabs and the Schedule "C" to which the homeowner referred was simply a schematic representation. The Tribunal finds as well that the homeowner has failed to prove his claim.

On the basis of all of the evidence, the Tribunal finds that the Program has been reasonable with this homeowner and in fact finds that the builder has also been reasonable with this homeowner. It appears that the builder has effected some repairs beyond the warranty period and, therefore, has behaved in a reasonable and responsible fashion to the complaints of the homeowner.

The homeowner in his evidence testified that he had not read the Act in respect to the warranty and appeared not to have understood or tried to understand the extent of the warranty given to new homeowners by the Legislature of the Province of Ontario. It is unfortunate that as a result, a considerable amount of time and effort by the Program, the builder and the Tribunal have gone to waste.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal hereby confirms the decision of the Ontario New Home Warranty Program to disallow the claim of Mr. and Mrs. Zamaria.

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